MUNICIPAL BOARD DECISIONS

VOLUME SEVEN-B/1988

PART I

Nova Scotia

Municipal Board

90-01876/

MEMBERSHIP OF NOVA SCOTIA MUNICIPAL BOARD

CHAIRMAN:	MICHAEL G. JOHNSON, C.A.
VICE-CHAIRMAN:	LINDA D. GARBER, LL.B.
MEMBER:	RICHARD L. WELDON
TERM O.I.C. APPOINTMENTS:	R.H. BLOIS, Q.C. ELIZABETH SALTON

****

DOREEN A. FRIIS — Clerk

CLYDE A. PAUL, LL.B. — Counsel

THIS VOLUME CONTAINS ALL PLANNING, MUNICIPAL BOUNDARIES AND OTHER DECISIONS (EXCEPT ASSESSMENT) FROM JANUARY 1, 1988, TO DECEMBER 31, 1988.

THESE DECISIONS ARE PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTER 9, STATUTES OF NOVA SCOTIA, 1981.

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ARMOYAN GROUP LTD. v. TOWN OF BEDFORD

PLANNING - L.U.B. AMENDMENT - REFUSAL TO REZONE FROM R-1 TO R-2 - 48 LOTS FOR SEMI-DETACHED HOUSING - WHETHER REASONABLY CARRIES OUT THE INTENT OF THE M.P.S. - BEDFORD M.P.S. POLICIES R-4a, Z-4.

This is an appeal by A.G.L. from a decision of the Council of the Town of Bedford refusing to rezone 48 lots in Phase III of the Bedford Hills Subdivision from R-1 to R-2 to permit semi-detached housing. The Town's M.P.S. gives little direct policy guidance for R-2 development. Many existing R-2 uses were made non-conforming by M.P.S. Several larger scale residential developments with higher densities have been approved by the Town.

HELD The Board allowed the appeal and instructed Council to rezone 48 lots from R-1 to R-2.

Mixed housing types are endorsed by M.P.S. in certain conditions. Board does not accept that total acceptance, partial acceptance or total rejection by Council would each be equally consistent with the M.P.S. Application meets criteria of Policy Z-4 and is within an area that is economically viable for the Town to serve. The development would not negatively affect the character of the Town or be a liability to the neighbourhood.

NSMB-569-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, Chapter 9;

- and -

IN THE MATTER OF: An Appeal by Armoyan Group Limited (formerly known as Tri-Arm Developments Limited) from the decision of the Council of the Town of Bedford made February 16, 1987, which refused to amend the Town's Land-use By-law by rezoning 48 proposed lots in Bedford Hills Subdivision from Residential Single-Family (R-1) Zone to Residential Two-Family (R-2) Zone.

BEFORE: ELIZABETH SALTON, Member.

COUNSEL: ROBERT G. GRANT, LL.B., RICHARD A. HIRSCH, LL.B. and BIRBE SANDSTOM, Articled Clerk for the Appellant;

PETER A. MCINROY, LL.B., for the Town of Bedford.

DECISION

A hearing was held by the Board on June 29 and 30 and July 2, 1987, in the Bedford Fire Hall, 1247 Bedford Highway, on an appeal by Armoyan Group Limited (formerly known as Tri-Arm Developments Limited) from the decision of the Council of the Town of Bedford made February 16, 1987, which refused to amend the Town's Land-use By-law by rezoning 48 proposed lots in Phase III of Bedford Hills Subdivision from Residential Single-Family (R-1) Zone to Residential Two-Family (R-2) Zone. The Notice of Appeal (Exhibit A-1) was dated February 20, 1987 and received by the Board February 23, 1987.

The stated grounds for the appeal are as follows:

> "1. The decision of the Council of the Town of Bedford cannot reasonably be said to carry out the intent of the Municipal Planning Strategy.
>
> 2. The Appellant would suffer undue hardship in the event that its appeal were not allowed.
>
> 3. There are extraordinary and compelling circumstances for granting the appeal in this matter."

In this appeal filed pursuant to Section 63(1) of the Planning Act, the Appellant is the applicant for the rezoning which was refused by Town Council. The Board having satisfied itself that all necessary preliminary matters had been carried out proceeded to hear the appeal on the merits.

Bedford Hills Subdivision (formerly Bedford Village North) lies to the north of the Hammonds Plains Road, generally between Basinview Drive South and Bedford Hills Road, with lands of Basinview Estates Subdivision forming its northern boundary. The terrain is hilly with a high incidence of bedrock close to the surface. There is evergreen tree cover where the land has not been cleared for development.

The chronology of events leading up to the decision under appeal is as follows. In 1985 Tri-Arm Developments Limited purchased approximately 37 acres of undeveloped land known as Bedford Village North from Bedford Village Subdivision Limited. The parcel at that time was zoned R-1. In the fall of that year, a rezoning application by the developer (the Appellant) was approved creating 57 R-2 lots and two R-3 parcels intended for two apartment buildings of 24 units and 36 units. The balance of the lands, now called Bedford Hills Subdivision, remained R-1.

In December of 1985 the developer requested a further rezoning of 48 lots from R-1 to R-2. In February 1986 before Council could consider this application it was withdrawn at the request of the developer. A new but similar application for the rezoning of 48 R-1 lots to R-2 was made by the developer in November 1986 and rejected by Council in February 1987 - the decision now under appeal.

The Town's Planning staff recommended a partial approval of the developer's first rezoning application for the proposed 48 lots, with only 13 of these lots recommended for rezoning to R-2 and the remaining 35 to remain R-1. When the developer's second application to rezone the proposed 48 lots was considered by Planning Staff, the recommendation consisted of two alternatives; either that 13 lots closest to the existing R-1 Bedford Village development remain R-1 and the balance be rezoned R-2, or that all 48 proposed lots be rezoned R-2.

Counsel for the Appellant called 5 witnesses and Counsel for the Town called eight witnesses. One person spoke on his own behalf.

Witnesses for the Appellant believed that additional R-2 zoning in Bedford Hills phase III would be consistent with the policies of the Town's Municipal Planning Strategy (M.P.S.) because it would provide a mix of housing types compatible with existing and proposed R-1 housing in the area. According to one witness, the only R-2 zones in the Town of Bedford are in phase II of this development. The developer believed that R-2 homes in this area would be buffered from existing R-1 development in the adjacent Bedford Village Subdivision by an intervening narrow strip of parkland and by a rock ridge at the rear of the lower Bedford Village lots. All streets in the Bedford Hills Subdivision can be accessed by Basinview Drive South, a major arterial road, avoiding increased traffic through existing residential development.

The Appellant acknowledged that development costs in Bedford Hills Subdivision were higher than elsewhere in the Town and for that reason R-2 housing would provide a greater return on investment than R-1 development. He believed that there was more demand for R-2 housing which was less expensive to purchase than single family homes. It was argued that R-2 development would result in a larger population base to support the commercial development in the Town and it was claimed that no other subdivision in Bedford was currently selling lots in the price range proposed for Bedford Hills Subdivision.

Witnesses opposed to the rezoning expressed the view that the rezoning of the proposed 48 lots in Phase III in Bedford Hills Subdivision would result in what one described as "a horrendous concentration of R-2 development" which would exceed the capacity of the school system. Glen Moir School, the elementary school which serves the area, is located between

Basinview Drive South and Doyle Street to the east.

Concern was expressed about buffering between the proposed R-2 development and the adjacent Basinview Estates Subdivision which is intended to be developed with single-family homes. The parkland areas proposed by the Appellant to be deeded to the Town were considered unacceptable as recreation land because of excessive rock and slope.

Duplex housing was considered more likely to become rental housing and a preference for owner-occupied units was expressed. The concentration of R-2 in one area of the Town was a principal concern of the opponents of the proposed rezoning. Some witnesses expressed anxiety that approval of this rezoning would undermine public confidence in public participation in planning since many area residents had assumed that the previous rezoning application by the developer was a final comprehensive zoning package for all three phases of Bedford Hills Subdivision. The subsequent application for additional R-2 zoning was seen by some witnesses to be almost a breach of trust.

The developer's contention that demand for semi-detached housing exceeds the demand for single-family housing was disputed with statistics to indicate that the construction of R-2 housing in the previous two years had so exceeded the average demand that this trend could not continue because supply now exceeded demand.

It was conceded by both supporters and opponents of the rezoning application refused by Council that the Town's M.P.S.

gives no direct policy guidance for R-2 development. According to John Malcolm, Senior Planner and Assistant Development Officer with the Town, the statements and policies in the M.P.S. relevant to this proposed rezoning are the following:

> "The following overall objective for the residential section was used as a general guideline. It is the objective of the Town Council:
>
> > to make provision for high quality, mixed housing types to meet the needs of a range of income groups. Such development will be allowed to occur in areas that are economically viable and in an environment that will enhance the character of the Town and be an asset at the neighbourhood scale."
>
> ....
>
> "Policy R-4a:
>
> > It shall be the intention of Town Council to make provision in the Zoning By-law for a range of residential uses, including: single detached, two family, townhousing, apartment buildings and mobile homes."

Policy R-4a is found in the Residential Section of the M.P.S. under the heading "Housing Types." Other policies in the section deal with mobile homes and apartment development. The Board heard evidence that the extensive criteria set out for apartments originated from a wide spread concern about excessive apartment developments in the Town at the time the M.P.S. was being written. At that time, existing R-2 uses were scattered about the Town and not concentrated in any one area. Although the Board heard that existing R-2 uses were not considered a "problem", many were nevertheless made non-conforming uses by the M.P.S. and no specific policy guidance on the future distribution or the desireable proportion of duplex or semi-detached uses was included in the M.P.S. Some of the concepts in the Section of the M.P.S. on the location of apartment development were considered by one witness to be applicable to R-2 development as well, particularly the following sentence:

> "....Thirdly, the concentration of apartment buildings is a concern; therefore new development should be dispersed throughout the Town to maintain a balance in the economic and social makeup of the neighbourhoods."

Since very little land in the Town was prezoned R-2 by the M.P.S., all other land proposed for R-2 development must be rezoned and so is subject to Policy Z-4 in the M.P.S.:

> "Policy Z-4 It shall be the policy of Town Council in considering zoning amendments and contract zoning, in addition to all other criteria as set out in various policies of this plan, to have regard to the following matters:
>
> 1) That the proposal is in conformance with the intent of this Plan and with the requirements of all other Town By-laws and regulations;
>
> 2) That the proposal is compatible with adjacent uses and the existing development form in the area in terms of the use, bulk, and scale of the proposal;
>
> 3) Provisions are made for buffering, screening and access control to reduce potential incompatibilities with adjacent land uses and traffic arteries;
>
> 4) That the proposal is not premature or inappropriate by reason of:
>
> i) the financial capability of the

Town to absorb any costs relating to the development;

ii) the adequacy of sewer and water services, including fire flows and water pressure, or if services are not provided, the adequacy of physical site conditions for private on site sewer and water systems;

iii) precipitating or contributing to a pollution problem in the area;

iv) the adequacy of storm drainage and the effect of drainage areas on adjacent uses;

v) the adequacy and proximity of school, recreation, and any other community facilities;

vi) the adequacy of street networks in, adjacent to, or leading toward the development regarding congestion and traffic hazards;

vii) the potential for the contamination of water courses or the creation of erosion or sedimentation;

viii) impact on public access to the shorelines or the waterfront;

ix) the presence of natural, historical features, buildings or sites;

x) creating a scattered development pattern requiring extensions to trunk facilities and public services while other such facilities remain under utilized.

5) Where this plan provides for special agreements or contracts to ensure compatibility or reduce potential conflicts, such agreements may relate to, but are not limited to, the following:

i) type of use, density, and phasing;

ii) emissions including air, water, and

noise;

iii) traffic generation, access to and egress from the site, and parking;

iv) open storage and landscaping;

v) provisions for pedestrian movement and safety;

vi) provision and development of open space, parks, and walkways;

vii) drainage both natural and subsurface and soil stability;

viii) performance bonds;

ix) the compatibility of the structure in terms of design and appearance with adjacent residential uses.

6) Suitability of the proposed site in terms of steepness of slope, soil conditions, rock outcroppings, location of watercourses, marshes, swamps, bogs, areas subject to flooding, proximity to major highways, ramps, railroads, or other nuisance factors.

7) In addition to the foregoing, all zoning amendments and contract zoning agreements shall be prepared in sufficient details to provide:

i) Council with a clear indication of the nature of the proposed development; and,

ii) Permit staff to assess and determine the impact such development would have on the proposed site and the surrounding community.

According to Mr. Malcolm, in spite of the intention to provide for a diversity in housing types, single family residential development has increased as a percentage of all housing types in the Town since the M.P.S. was adopted and approved. He agreed that the objective of acquiring additional two-family housing, set out in residential policy R-4a, can only be achieved by rezoning or by development agreement.

In Mr. Malcolm's view the criteria set out in Policy Z-4 must be considered by Council, but different "weights" can be given to various sections of Policy Z-4. Although he had recommended in Staff Reports to Council that some or all of the 48 proposed lots in the rezoning application be approved, Mr. Malcolm concluded that Council's decision was not inconsistent with the intent of the M.P.S. given the lack of guidance contained in it on the appropriate distribution and proportion of two-family residential uses in the Town.

The Board agrees that the Town's M.P.S. gives little specific policy guidance on semi-detached and duplex housing, an omission which may be rectified in the required review of the M.P.S. It is clear however that mixed housing types are endorsed 1. "in areas that are economically viable"; 2. "in an environment that will enhance the character of the Town" and 3. [provided that they are] "an asset at the neighbourhood scale." Staff Reports to Council on both the first and second applications by the Appellant for R-2 zoning of 48 proposed lots were written by Mr. Malcolm. In addition he submitted a further report to Council on February 13, 1987 intended to clarify facts in the first two reports. Each of these reports (included in Exhibit A-2) sets out tables of statistics on present and future housing unit mix in the Town showing the percentages of single-family, two-family, Townhouse and Multiple Family units.

The concluding analysis in the first Staff Report dated January 23, 1986 states:

> "Analysis
>
> The preceding comments indicate that from a number of points the rezoning of the 48 lots from R-1 to R-2 will not have an adverse impact. However it is the Department's contention that if the entire 48 lots were to be rezoned to permit R-2 development, the resultant housing mix would not be appropriately balanced and consequently could not be considered "an asset at the neighbourhood level" (Residential Chapter M.D.P.).
>
> However, if the Town wished to consider an alternative housing mix then the Department would support the rezoning of 13 R-1 lots to R-2; those lots being sited around Court F. This would then leave a belt of proposed R-1 uses between the R-2 and those R-1 uses now existing on Bedford Hills Road. The additional thirteen R-2 units would statistically add one child per grade or a total of 12 children. This alternative is shown on Map 3.
>
> Alternatives
>
> 1) Approve rezoning for the reasons cited by developers. This would increase the availability of R-2 lots in the Town and allow a more extensive range of income groups to locate in Bedford.
>
> 2) Reject the rezoning request as being inappropriate for the neighbourhood.
>
> 3) Accept part of the request for 13 lots and reject the other 35 lots for R-2 development as shown on Map 3.

> Recommendation
>
> It is the Planning and Development Department's recommendation that Town Council reject the rezoning for 35 of the 48 lots and accept it for the remaining 13 lots located on the Roy Street cul-de-sac."

The second Staff Report dated January 9, 1987, is described in the introduction as supplementary to the January 23, 1986 report. The conclusion of the second report is as follows:

> "Conclusion
>
> The preceding comments have discussed a number of factors that have been re-evaluated in light of events that have occurred since the original rezoning request came before the Town. This report noted that the previous departmental report recommended that only an additional 13 R-2 lots be approved at that time given uncertainty about the area's total housing mix and the dominance of R-2 versus R-1 units.
>
> This was due to uncertainty as to the future development of the Basinview Estates Subdivision. It is now apparent that the subdivision will be totally R-1 and will generate approximately 250 units when fully developed. Therefore an additional 48 R-2 lots in this subdivision will not substantially change the area's general characterization as a single family detached residential area. Due to a recent subdivision of the approved R-3 lot on Basinview Drive South the number of R-3 units have been reduced by half (from 60 to 30 units) to create 10 R-2 lots. Consequently the total number has decreased by ten units. In addition the impacts of the additional 48 R-2 lots on the Town's housing stock unit mix was shown to be negligible on the provision of hard services.
>
> Traffic was shown to be of minimal impact to adjacent existing residential areas since the flows are directly down to Basinview Drive South and then out to Hammonds Plains Road. The park issue remains uncertain in terms of the "green buffer strip" and a small portion of parkland along Basinview Drive South on the east side of Basinview Drive South where it abuts the LeBrun Recreation Centre. If these areas are resolved in a

positive manner by the developer then the green strip would act as a buffer strip and accordingly separate existing R-1 units from the proposed R-2 lots. Then any potential incompatibilities between the different housing types would be mitigated by this natural green strip and by the grade differential now contained in that green buffer strip, i.e. the rock ledge that now runs along the backs of the Bedford Hills Road units.

If this issue is not resolved satisfactorily then as a general planning principle the lots that abut directly onto the existing R-1 lots along Bedford Hills Road should also be R-1. Finally the school situation was briefly discussed above. Two major points were noted. First, that an additional 48 R-2 units will not statistically generate a large increase in the number of elementary school age children. When based on the generation rates observed from all of the R-2 units in the Town during the 1985/86 school enrollment year the additional increment would be approximately 5 students for the elementary grades during any one year. Secondly it was noted that in any event the Provincial Government appears to have a policy whereby new school construction will not begin until over-crowding is observed at the existing elementary school. Therefore whether the additional 48 lots provide some space problems or in fact if it is the additional R-1 units being proposed for the Basinview Estates Subdivision, the result appears to be the same: that is, at some point in the next three to five years there will be over-crowding at the Glen Moir School which will have to occur before the Province takes remedial action.

Finally, it was noted above that, since this proposed rezoning is for the final stage of the Bedford Hills Subdivision, it can be evaluated in terms of the impacts from the total project and consequently should not be viewed as piece meal development where there are future phases of the project which may alter the impacts observed from this rezoning application.

Recommendation

In light of the foregoing it is the Department's recommendation that EITHER: (As Shown on the Attached Maps)

ALTERNATIVE 1

> This rezoning request be approved with Lots #263, 264, 265, 266, 267, 268, 324, 325, 326, 327, 328, 329, 330 being kept as R-1 units if

> the "green buffer strip" is not in fact set aside and turned over to the Town as such.

OR

ALTERNATIVE 2

> The proposed rezoning for the entire 48 lots be approved as being consistent with the M.D.P.'s Residential Objective and Policies contained therein in light of the recent development trends for the general area of the Bedford Hills, Basinview Estates, and the Bedford Village North Subdivision and on condition that the "green buffer strip" be dedicated as public parkland."

The final "clarification" report dated February 13, 1987, comments on public input at the hearings on the application covering the topics of housing mix, elementary student generation rates, the "green buffer strip", Basinview Estates, and the planning process. It concludes by saying that "the January 1987 report supplements and does not replace the January 1986 report". Since the final recommendations in those two reports were different, although each recommended approval of at least a portion of the rezoning application, the Board can only conclude that the later supplementary report should be given somewhat more weight.

The Board considered the evidence presented at the hearing of this appeal, Counsel's post-hearing briefs and the Board's impressions from a visit to the site and surrounding area. The Board is governed by Subsections (3), (4) and (5) of Section 63 of the Planning Act which state:

> "(3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal

> planning strategy.
>
> (4) The Board may
>
> (a) confirm the decision of the council;
>
> (b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law; or
>
> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board.
>
> (5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

The clear instruction contained in subsections (3) and (5) is that the Board must measure Council's decision by the intent of the M.P.S.

Counsel for the Appellant naturally argues that the proposed rezoning is "entirely consistent" with the overall objective of the residential section of the M.P.S. and with Policy R-4a, both previously cited, and therefore Council's decision to refuse to approve this rezoning application could not be said to reasonably carry out the intent of the M.P.S. While the overall objective establishes the goal of "high quality, mixed housing types", Counsel for the Appellant acknowledges that there is no guidance in the M.P.S. about the size of the area to be considered for the housing mix. He argues that "the question of mix is to be analysed by examining the mix in Bedford as a whole" citing a table in the M.P.S. preceding the residential section which shows the number and proportion of "dwelling units by type" in the Town as a whole. This implies, he contends, that housing mix is to be considered with reference to the whole Town, not just the neighbourhood as it was variously defined by witnesses expert and otherwise at the hearing.

Counsel for the Town was in the awkward position of having to refute the expert opinion of the author of the Staff Reports, Mr. Malcolm, whose two reports and subsequent memo all recommend either total or partial approval of the rezoning application as consistent with the intent of the M.P.S. After reviewing the three choices set out in Mr. Malcolm's 1986 staff report and the two additional choices in his 1987 staff report, Counsel for the Town concludes: "If all of those alternatives can be justified within the Municipal Planning Strategy and its policies or lack thereof for R-2 housing, then how can it possibly be said that Council's decision not to rezone any of the lots from R-1 to R-2 does not reasonably carry out the intent of the Municipal Planning Strategy?" Counsel continues: "In addition, Mr. Malcolm in his evidence adds weight to this crucial submission when he stated that council's decision, considering the lack of guidance in the M.P.S., was a position equally valid to his recommendation in his 1987 report."

The Board cannot accept that any decision by Council on this application reasonably carries out the intent of the M.P.S., that is, that total acceptance, partial acceptance or total rejection of the application would each be equally consistent with the M.P.S. It is agreed by all that policy guidance in the

Town's M.P.S. for a rezoning application such as this is minimal. There are however statements in the M.P.S. which indicate that mixed housing types are desirable under certain conditions. First, any rezoning must meet the criteria set out in Policy Z-4 of the M.P.S. The Board accepts the evidence of the Town's planner that the rezoning application meets this test. Secondly, the Overall Objective for the section of the M.P.S. dealing with residential development states that the provision of mixed housing types should be in areas that are economically viable, should enhance the character of the Town, and should be an asset at the neighbourhood scale.

The Board accepts the evidence of the Town's witnesses that economically viable areas refers to areas which are economically viable for the Town to service. The subject area meets this test.

The M.P.S. states that the most significant land use in the Town is residential. At the time of the approval of the M.P.S., 64% of the housing units in the Town were single family homes although that percentage was said to have decreased steadily over the preceeding 5 years. The single family residential character of the Town, the predominant residential housing type, was diminishing at the time of the adoption and approval of the M.P.S. No policies in the M.P.S. discourage further diversification in housing types. Evidence at the hearing of this appeal indicates that several large scale housing projects approved by the Town have provided or will provide much higher density residential development (townhouses and apartments) than was proposed by the Appellant. Will the proposed 48 R-2 lots, in addition to the existing 67 R-2 lots in Bedford Hills, detract from the character of the Town more than the higher density residential projects already approved elsewhere in Bedford? Is the concentration of R-2 housing (a maximum of 230 housing units) proposed for Bedford Hills less of "an asset at the neighbourhood scale" than existing or approved high density residential development in this general area of Bedford?

In terms of new housing developments, the immediate neighbours to the Bedford Hills Subdivision are the Bedford Village North development to the west and the Basinview Estates subdivision whose development has just commenced to the north. Before the Appellant's 1985 rezoning approval, the existing Bedford Village North development consisted of 75% single family and 25% multiple family units. After the 1985 Bedford Hills rezoning the potential housing unit mix of Bedford Village North and Bedford Hills (now separate entities) became 42% single family, 26% two-family and 32% multiple family. Finally, counting in the potential 250 lots of Basinview Estates (zoned R-1), the potential housing mix of all 3 residential developments, if the 48-lot rezoning were approved, would be 53% single family, 31% two-family and 16% multiple family.

The Board has difficulty concluding that an increase in R-2 development in Bedford Hills Subdivision, making it a predominantly two-family residential area, would negatively affect the character of the Town or be a liability to the neighbourhood, considering the predominantly or exclusively single family development in the larger adjacent subdivisions of Bedford Village North and Basinview Estates. The 48 proposed R-2 lots in the Bedford Hills subdivision represent the third and final phase of the development. No R-2 housing is proposed, to the Board's knowledge, for the other large residential developments in the general area (Nelson's Landing, Piers Landing, Sobey's Mill Cove development).

The Board therefore determines that the decision of the Council of the Town of Bedford which refused to rezone 48 proposed lots in Bedford Hills Subdivision from R-1 to R-2 does not reasonably carry out the intent of the Municipal Planning Strategy. Pursuant to Section 63(4)(c) of the Planning Act, the Board allows the appeal by instructing the Council to rezone the 48 proposed lots in Phase III of the Bedford Hills Subdivision from R-1 to R-2.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 5th day of January, A.D., 1988.

EA Salton

ELIZABETH SALTON
Member.

NOVA SCOTIA MUNICIPAL BOARD

BITAR v. **MUNICIPALITY OF EAST HANTS**

PLANNING - DEVELOPMENT AGREEMENT - REFUSAL TO APPROVE TO ALLOW TWO 25-UNIT APARTMENT BUILDINGS - WHETHER PROPOSAL CONSISTENT WITH M.P.S. - PLANNING ACT s.s. 72(4) - MUNICIPALITY OF EAST HANTS M.P.S., POLICIES P 3-13, P 9-11.

This is an appeal by A.B. as applicant from a decision of the Council of the Municipality of the District of East Hants refusing to enter into a development agreement to permit construction of two 25-unit apartment buildings in Enfield. Due to the current over-capacity of the Enfield sewage system, the proposed development agreement contains a term that there would be no development permits issued until there is sufficient municipally approved central piped services capacity within the sewage system and other services. The Staff Report recommended approval.

HELD: The Board dismissed the appeal.

Policy P 3-13 and Policy P 9-11 of the M.P.S. each contain evaluation criteria which must be considered separately. The criteria in P 3-13 must be satisfied prior to Council entering into a development agreement. The criteria in P 9-11 is to be used to evaluate the proposed development and agreement. One of the criteria in P 3-13 is that the proposed development is served by municipally approved sewer services and does not strain the municipal services with particular regard to demands on the sanitary sewage system. A clause in the development agreement will not satisfy this prerequisite. It must be satisfied prior to Council considering the terms and conditions of the agreement.

NSMB-587-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S. 1983, c.9, as amended;

- and -

IN THE MATTER OF: An Appeal by ALBERT BITAR from a decision of the Council of the Municipality of the District of East Hants made June 9, 1987 refusing to enter into a development agreement to permit the construction, in phases, of two 25 unit apartment buildings on lands in Enfield.

BEFORE: LINDA D. GARBER, Vice-Chairman

COUNSEL: DAVID ENGLISH, LL.B., for the Appellant;

ROBERT CARRUTHERS, LL.B., for the Municipality.

DECISION

A hearing was held by the Board on December 14, 1987 in the Council Chambers of the Municipality of the District of East Hants on an appeal by Albert Bitar from a decision of the Council of the Municipality of the District of East Hants made June 9, 1987 by which Council refused to enter into a development agreement to permit the construction of two 25-unit apartment buildings on lands in Enfield.

The Notice of Appeal is dated June 30, 1987 and was received by the Board on that date. The stated grounds of appeal are:

> "1. That the proposed Development Agreement is not inconsistent with the intent of the Municipal Planning Strategy, but consistent with it.
>
> 2. Council's decision cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy.
>
> 3. Such other grounds as may appear at the hearing of the appeal."

There were no additional grounds of appeal raised at the hearing. There were no preliminary objections and the Board assumed jurisdiction to hear the appeal on its merits.

The subject property is owned by the Appellant. It consists of 3.5 acres of vacant land. It is what is described as a "flag lot" with a 20 foot wide strip running 342 feet from Trunk Highway No. 2 to the main portion of the lot. This 20 foot strip is the access driveway to the property and abuts the 12.5 foot driveway of E.H. Horne Elementary School. The 12.5 foot driveway is used by the school buses to pick-up and unload students and as well, the drivers have been using a portion of the Appellant's 20 foot driveway. There are 5 single family homes which abut the property. The Appellant proposes to build two 25-unit apartment buildings in phases on the subject property. The buildings are to be located at the front of the lot with parking and a recreation area to the rear. The subject property is, at present, zoned Residential (R-2) and on the Generalized Future Land Use Map of the Planning Strategy is designated Residential Subdivision.

Initially the Appellant had sought a rezoning of the subject property from R-2 to R-3 to permit a six unit building. At that time, July 1986, he was advised by letter from the Municipal Clerk that if the rezoning was approved, he would not be issued a Development Permit or a Building Permit "because of the current over-capacity of the Enfield Sewer System". Mr. Bitar continued to pursue the rezoning for a time then withdrew the application before the public hearing stage and sought approval to enter into the development agreement to permit the construction of the larger buildings.

The situation with respect to the over-capacity of the Enfield Sewer System has not changed. One of the terms of the proposed development agreement is that there will be no development permit issued until:

> 2(b) It is determined by the Municipality, in writing to the Developer as a condition to be satisfied for each of the Phases, that there is sufficient municipally approved central piped services capacity within the Enfield sewage treatment, sewage, water treatment and water distribution systems, to accommodate each of the Phases described in this Agreement, and..."

The evidence at the hearing was to the effect that the earliest that a new sewage treatment system could be in place would be 1989. It should be noted that there are no clauses in the proposed agreement as to timeliness on the part of either the Municipality or the Developer.

The proposed development agreement was recommended for approval in the Staff Report. The Planning Advisory Committee recommended approval on a vote of 5 to 2. Subsequently one of the dissenting voters wrote to the Clerk of the Municipality that he had changed his position and now supported the proposal. The Public Hearing was held on June 9, 1987. A number of persons spoke in opposition to the proposal. According to Council minutes their concerns focused on traffic generation, safety for school children and adequate buffering for abutting properties. The Deputy Warden raised concern about the timing of the approvals and the effect of any delays in providing servicing. The Council's vote on the motion to approve the development agreement was six against and four in favour.

The Appellant called the Planning Co-ordinator, Brad Hodgins, as his sole witness. The Municipality called no witnesses. Mr. Alex McKeen, Chairman of the Enfield Ratepayers Association, and his wife, Mary McKeen, President of the Enfield Branch of the Women's Institute of Nova Scotia, spoke on behalf of their respective associations in opposition to the proposed development.

An appeal from Council's refusal to enter into a development agreement is governed by Section 72 of the Planning Act. Subsection (4) sets out the Board's power on an appeal and states in part as follows:

> "Section 72(4) The Board shall not interfere with the decision of the Council pursuant to this Section unless the Board determines that the decision not to enter into the agreement cannot reasonably be said to be consistent with the intent of the municipality strategy...".

In the Staff Report which was prepared for the Planning Advisory Committee and Council and which was included in Exhibit B-1, Mr. Hodgins identified the two policies in the Planning Strategy which are most relevant in considering the proposed development, Policy P3-13 and Policy P9-11.

Policy P3-13 provides, in part, as follows:

> "P3-13 Notwithstanding P3-12, it shall be the intention of Council to consider and permit the development of multiple family dwellings by development agreement within the "Residential Subdivision" or "Commercial" Gen. FLUM designations, ...providing the following criteria are satisfied:
>
> (b) The proposed development is served by municipally approved sewer and water services and does not strain municipal services with particular regard to demands on the sanitary sewer system, water utility, fire protection, garbage collection, school enrollments and school busing;
>
> (c) The proposed development does not negatively impact upon pedestrian and motor vehicle circulation, with particular regard to ingress and egress from the site, traffic flows and parking areas;
>
> (g) Comments arising from the public hearing on the proposed development with regard to consistency with Strategy policies;"

The Board interprets Policy P3-13 to mean that the criteria are prerequisites which must be satisfied prior to the Council entering into a development agreement.

Policy P9-11 provides in part, as follows:

> "P9-11 ...it shall be the intention of Council to consider the following evaluation criteria...
>
> (a) Evaluation criteria consistent with policies of the strategy:
>
> (ii) The impact of the proposed development on municipal services with particular regard to demands on

> the piped sewer and water systems, fire protection, refuse collection and schools;
>
> (iii) The impact of the proposed development on pedestrian and motor traffic circulation with particular regard to ingress and egress from the site, traffic flows and parking areas;"

The Board interprets Policy P9-11 as the evaluation criteria which the Board is to consider in evaluating the proposed development and the contents of the agreement.

In the Staff Report because of similarities in the evaluation criteria, Policies P3-13 and P9-11 were not separately evaluated. In the Board's opinion, the evaluation criteria in Policy P3-13 and Policy P9-11 must be considered separately. The requirements of Policy P3-13 must be satisfied before Council can consider entering into a development agreement. If the requirements of P3-13 are satisfied then the proposed development and the agreement are to be evaluated using the criteria in clause (a) of Policy P9-11.

The first question for the Board is whether or not the criteria of Policy P3-13 have been satisfied. Dealing in reverse order with the three relevant criteria of Policy P3-13 cited above the Board has the following comments:

(g) Comments at the Public Hearing

While Planning staff can anticipate public reaction and can provide some response, this criteria cannot be satisfied until Council has held the public hearing. In this case, there were a number of persons who spoke in opposition to the proposal and most of their comments focused on safety and traffic issues. In the Board's opinion this criteria has been satisfied.

(c) Traffic

In the Staff Report it is stated that "favourable comments on the safety of the lot access have been received from the Department of Transportation". Mr. Hodgins contacted the Department of Transportation for their comments on the proposed developments. In a letter dated September 22, 1986, Mr. R.R. Freeman, Division Engineer for the Department of Transportation advised that the stopping site distance was adequate and that "the construction of either a 6 unit or 12 unit building would make no difference in impact of this access point". In a subsequent letter, dated May 22, 1987, which was a follow-up to a phone conversation, Mr. Freeman requested that a detailed construction plan be provided to the Department for review "before final approval is given" This request was included in the development agreement as a prerequisite to the issuing of the development permit. The concern on the part of Mr. Freeman was the turning radii of the adjacent school driveway. The Board notes that it is not clear from the second letter that the Department of Transportation is aware that the proposal is no longer for a 6 or 12 unit building. Mr. Hodgins also made inquiries of various officials with the School Board to determine whether the School Board was planning to make any changes with respect to the 12.5 foot driveway which abuts the Appellant's access driveway. In the Staff Report it is stated that the School Board is reviewing measures to improve bus access and on-site traffic circulation. Mr. Hodgins conducted a traffic survey at the school on June 1, 1987 between 8:10 and 8:34 A.M. He also contacted Halifax Airport Operations and two tenants of the Aerotech Park, Pratt and Whitney and Litton Canada, to obtain information on the times of the various shifts. From the information obtained he concluded that any employees of these three operations who lived in the vicinity would have passed by the subject property prior to 8:00 A.M.

While the Board is of the view that there is legitimate concern for safety with respect to the school buses using the 12.5 foot school driveway, it is not the proposed development which is the cause of the concern, but the fact that the existing driveway on the school property appears to be inadequate and so the bus drivers have been using the Appellant's property, apparently without objection. Given that it is not clear that the Department of Transportation is aware of the increased size of the proposed development and that the Department has not given final approval, the Board is of the opinion that this criteria has not been satisfied.

(b) Sewage System

As has been noted above the development agreement provides that the development cannot proceed until the Municipality has determined that there is "sufficient Municipally approved central piped services capacity within the Enfield sewage treatment ... system(s)....". Does this provision satisfy the criteria set out above in clause (b) of Policy P3-13? In the Board's opinion it does not. The criteria in Policy P3-13 must be satisfied before Council can consider entering into a development agreement. There is clearly a problem serving the subject property for sewage and it would, in fact, strain the existing services. A clause in the development agreement will not satisfy this prerequisite. It must be satisfied prior to Council considering the terms and conditions of the agreement.

Having determined that not all of the criteria in Policy P3-13 have been satisfied, it is not necessary for the Board to review the evaluation criteria in Policy P9-11.

The Board is of the opinion that the proposed development is premature. Two of the criteria set out in Policy P3-13 have not be satisfied. The Council's decision, to refuse to enter into a development agreement is reasonably consistent with the intent of the Planning Strategy. The Board, therefore, dismisses the appeal.

An Order will issue accordingly.

DATED at Halifax, Nova Scotia, this 8th day of January, A.D., 1988.

Linda Garber

LINDA GARBER
Vice-Chairman

NOVA SCOTIA MUNICIPAL BOARD

LIVINGSTONE v. TOWN OF PORT HAWKESBURY

PLANNING - L.U.B. AMENDMENT - APPROVAL OF REZONING FROM R-2 TO R-3 TO PERMIT 24-UNIT APARTMENT BUILDING - WHETHER REASONABLY CARRIES OUT THE INTENT OF THE M.P.S. - PORT HAWKESBURY M.P.S. POLICIES P-8, P-9 AND I-10.

This is an appeal by M.G.L. as an aggrieved person from a decision of the Council of the Town of Port Hawkesbury rezoning lands on the Old Sydney Highway from Residential Two-Family (R-2) Zone to Residential Multiple-Family (R-3) Zone to permit the construction of a 24-unit apartment building. M.G.L. is building a house across the street from the subject property. At P.A.C. and Council questions were raised about the lack of information provided by the Applicant and the impact of the development on the water system in the area. Council held two public hearings and following the second rezoned the land. The M.P.S. required that the development be located on a collector or arterial road. The Old Sydney Highway is a proposed minor collector.

HELD: The Board allowed the appeal and reversed the decision of Council amending the L.U.B.

Location on a proposed collector road does not satisfy the requirements of the M.P.S. Expert evidence was given that development would impact on the water pressure and that it would not be an adequate water service as required by the M.P.S. The report from the Town Engineer was inadequate in that it did not address the relevant criteria and contained the opinion of the Applicant's consultant not the Town Engineer's. Questioned whether Council had sufficient information from Applicant respecting parking, recreational open space and buffering.

NSMB-593-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, being Chapter 16 of the Statutes of Nova Scotia, 1969, as amended;

- and -

IN THE MATTER OF: An Appeal by **M. GERARD LIVINGSTONE**, from a decision of the Council of the Town of Port Hawkesbury made the 27th day of August, A.D. 1987, whereby the Council approved an amendment to the Town's Land-Use By-law by rezoning approximately 3.32 acres of land bordering Waye Avenue (Old Sydney Highway), Ryan Road and Southbrook Cemetery from Residential Two-Family (R-2) Zone to a Residential Multiple-Family (R-3) Zone on the application of **WILLIAM MacRAE.**

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: ROBIN B. CAMPBELL, LL.B., on behalf of the Appellant;

LAWRENCE EVANS, Q.C., on behalf of the Town of Port Hawkesbury.

DECISION

A hearing was held by the Board on January 19, 1988, in the Provincial Court in Port Hawkesbury on an appeal by **M. GERARD LIVINGSTONE** from a decision of the Council of the Town of Port Hawkesbury made August 27, 1987, which approved an amendment to the Town's Land-Use By-law by rezoning approximately 3.32 acres of land bordering Waye Avenue (Old Sydney Highway), Ryan Road and Southbrook Cemetery from Residential Two-Family (R-2) Zone to

Residential Multiple-Family (R-3) Zone on the application of William MacRae. The purpose of the rezoning was to permit the building of a 24-unit apartment building.

The Notice of Appeal is dated September 6, 1987 and was received by the Board on September 12, 1987. The stated grounds of appeal raise concern over the impact of the proposed development on the Town's water and sewer system and traffic implications. The Appellant is building a house across the street from the subject property. He has alleged that he is an aggrieved person and that the proposed apartment building will devalue his property and affect his reasonable enjoyment of the property. The appeal is made pursuant to Section 63 of the Planning Act which Section was amended effective August 1, 1987 by Chapter 51 of the Statutes of Nova Scotia, 1987. A new subsection (1A) which defines an aggrieved person was added to Section 63. The solicitor for the Town did not dispute that the Appellant was an aggrieved person. The Board held that the Appellant is an aggrieved person. There were no preliminary objections. The Board determined that it had jurisdiction to hear the appeal.

There were 6 witnesses who testified on the Appeal: the Appellant and Belmont Shannon who resides in Summit Park, approximately 300 yards from the subject property for the Appellant; and for the Town, William MacRae, the Applicant, Lawrence Emms, a Municipal Engineer with U.M.A. Engineering Ltd, Morris E. Lloyd, Atlantic Regional Manager with the U.M.A. Group and Chris Leach, a Planner with the Department of Municipal

Affairs.

The Applicant, William MacRae, has been for some years the owner of 90 apartment units in the Town which rent from $370.00 to $400.00 per month. He testified that there has been some demand for upgraded apartments and he decided to purchase the subject property with the intention of constructing a 24-unit apartment building which would have a starting rent of $640.00 and up. The subject property is, at present, vacant land which borders on a cemetery. There is a second cemetery across the street. The property has 481.64 feet of frontage on the Old Sydney Highway, sometimes referred to as Waye Avenue, which is, at present, a dead end street. The property also has frontage on Ryan Road which is a street which intersects with the Old Sydney Highway. There are 3 houses on Ryan Road which border on the subject property. The Appellant is building a house on the Old Sydney Highway opposite the subject property.

The Town has a Municipal Planning Strategy (hereinafter referred to as the "M.P.S.") and a Land-Use By-law. A review of the Plan was completed in the fall of 1986 and received Ministerial approval in March, 1987. Since the Town does not employ a Planner, Chris Leach was assigned by the Community Planning Division of Municipal Affairs to act as a liaison planning officer for the Town. He assisted in the review of the M.P.S.

Before examining the relevant policies in the M.P.S. it will be helpful to outline the proceedings which were undertaken with respect to this rezoning.

In the later part of May, 1987, or early June, 1987, Mr. MacRae applied by letter for the rezoning. The application, according to the evidence of Mr. Livingstone, was discussed at the regular meeting of Town Council on June 9, 1987 at which time a public hearing was scheduled for July 9, 1987. Mr. Livingstone wrote to the Mayor and other members of Council on June 11, 1987, asking to speak at the Public Hearing and to be given copies of all pertinent materials. The public hearing scheduled for July 9, 1987, was advertised on two occasions in the Scotia Sun, a newspaper circulating in the area.

The Town Engineer who also acts as Development Officer provided a brief report to Council drawing their attention to some of the relevant provisions of the M.P.S. and advising that Council was to refer the matter to the Planning Advisory Committee for their recommendation. According to Council Minutes of July 9, 1987, which were included in Exhibit L-1, the Planning Advisory Committee met on July 8, 1987, and felt that there was insufficient information available for them to make a recommendation. At the public hearing on July 9, 1987, according to the Minutes, the Applicant's solicitor noted that it could require an investment of up to $40,000.00 for the Applicant to provide all the architectural and the development plans which the M.P.S. seemed to call for and that it was unreasonable to put out that kind of investment without some assurance of a return. There were no plans available at the hearing. The Appellant made a presentation at the public hearing against the rezoning.

The regular monthly meeting of Council followed the public hearing on July 9, 1987, and the rezoning was discussed. Various councillors raised questions regarding the lack of information and the impact of the development on the water system particularly the problem of insufficient water pressure in Summit Park which is a subdivision near the subject property. Council voted to table the issue for 30 days.

On July 28, 1987, Mr. MacRae wrote to the Mayor and enclosed a plot plan of the subject property and a site assessment report prepared by Strait Engineering Ltd. This report reviewed some of the criteria in the M.P.S. and stated that the proposal meets the requirements of the M.P.S.

According to the Minutes, Council decided at its regular monthly meeting on August 4, 1987 to consider the rezoning application at a special meeting that had been called for August 10, 1987 at 6:30 p.m. The meeting was not advertised, but a letter was sent to the Appellant advising him of the meeting. The meeting did not convene until 6:50 p.m. at which time it was announced that Council had been advised by a representative of the Department of Municipal Affairs (Chris Leach) that it would be in the best interests of all to hold a second public meeting. Council then passed a motion to hold a second public hearing on August 27, 1987.

At the second public hearing the Applicant, the Appellant and five other members of the public made presentations. Most of the presentations centered on water pressure problems but traffic and devaluation of property were also raised. There was a letter from the Chairman of the

Southbrook Cemetery Committee requesting that a chainlink fence be erected along the boundary if the rezoning was approved.

A special meeting of Council was held following the public hearing. A memo from the Town Engineer, dated August 26, 1987, was read stating that based on the information contained in the report by Strait Engineering Ltd. the proposal was in compliance with the requirements of the M.P.S. A copy of this memo was included in Exhibit L-1. Concern was raised by two councillors over whether the Old Sydney Highway was a collector road. There was also some discussion on the issue of water pressure. A motion to rezone the land was made and it was carried by a vote of 4 to 3, the Mayor voting with the majority.

When he testified at the appeal hearing, the Appellant stated on several occasions that he was concerned that Council was not following the requirements of the M.P.S. and that his motivation for the appeal was not limited to the impact that the proposed development will have on his new home. The Board notes that he attempted to bring to Council's attention some of the criteria that they were to consider.

It is stated in the M.P.S. that it is not Council's intention to prezone for multiple family use and that any lands which have been designated Residential on the Generalized Future Land Use Map may be rezoned for multiple family use provided the requirements for rezoning have been met. The relevant policies in the Board's opinion are Policies P-8, P-9, I-10, I-11 and I-13 which provide in part as follows:

> "P-8 Multiple family dwellings shall be permitted... if the development conforms to the following criteria:

i) That the development is served by municipal sewer and water services and that it will not strain the capacities of those services or the capacities of schools and parks; and

ii) the development does not require major improvements to roads, schools, recreation facilities or other social services.

P-9 When considering a rezoning to the Residential Multiple Family (R3) Zone, Council shall have regard to the following rezoning criteria:

i) That the parking areas required on each site are of sufficient size to satisfy the needs of the particular development and are well designed and properly related to building and landscaped areas;

ii) That there is adequate on-site recreational open space suitable in extent and design to the nature of the development;

iii) Where the development is located adjacent to existing or designated institutional, single family commercial or industrial uses, consideration be given to building design and the provision of barriers, berms, fences, landscaping, as part of the residential development to minimize infringement on the residential development of noise or traffic from the adjacent land use;

iv) that the development is required to be located on arterial or collector streets as shown on the Transportation Map (Map 4);

v) that the development will not involve a building over 3 stories in height; and

vi) that the proposal is consistent with the criteria of Policy I-10.

I-10 In considering amendments to the zoning in the by-law, in addition to all other criteria as set out in various policies of this planning strategy, Council shall have regard for the following matters:

a) That the proposal is in conformance with the intents of this Strategy and with the requirements of all other Town By-laws and regulations;

b) That the proposal is not premature or inappropriate by reason of:

> i) the financial capability of the Town to absorb any costs relating to the development;
>
> ii) the adequacy of sewer and water services to support the proposed development;
>
> iii) the adequacy and proximity of school, recreation and other community facilities;
>
> iv) the adequacy of road networks in, adjacent to, or leading to the development;
>
> v) the potential for the contamination of watercourses or the creation of erosion or sedimentation;
>
> vi) that new multiple dwellings are required to locate on arterial or collector streets; ...
>
> c) That adequate requirements are contained in the Land Use By-law to reduce conflict between the development and any other adjacent or nearby land use by reason of:
>
> i) type of use;
>
> ii) height, bulk, and lot coverage of the proposed building;
>
> iii) traffic generation, access to and egress from the site, and parking; ...
>
> vi) provision is made for buffering, landscaping, screening and access control to reduce potential incompatibility with adjacent land uses and traffic; ...
>
> I-11 In considering amendments to the Land Use By-law, it shall be the intention of Council to:
>
> a) request a report from the development officer; ...
>
> I-13 In considering an amendment to the Land Use By-law the Council shall have regard for those matters identified in Policy I-10 as well as the criteria set out in other applicable policies of this Strategy.

The Board is assuming that the purpose of Policy I-11(a) is to ensure that Council receives all the necessary information so that it can comply with Policy I-13. The Board is of the opinion that if the memo from the Town Engineer, which is referred to on page 6 of this decision, was intended as a report it is inadequate. The report should address the relevant criteria and should contain the Town Engineer's opinion, not that of the Applicant's consultant. It should be noted, however, that the briefs submitted by the Appellant at both public hearings did address some of the criteria which the Council is to consider and the Minutes indicate that Council did have regard to some of the criteria.

The Board has reviewed the criteria in the relevant policies. The Board notes that it could find no reference in any of the material submitted to Council respecting Policy P-8. While the evidence at the hearing of the appeal was that the subject property is served by municipal sewer and water services and that the proposed development will not strain the capacities of those services, there was no evidence presented as to the impact of the project on schools or parks or whether major improvements would be required to roads, schools, recreation facilities or other social services. While the Board does not believe that a 24-unit apartment building is likely to have a great impact on these services, these are criteria which must be considered by Council before the land can be rezoned for multiple family use. See Benedict v. Town of Truro (1985), 4 M.B.D. 291 in which the Board determined that Council cannot delegate to the Planner or any other body the duty to consider all the relevant policies in the M.P.S.

With respect to the criteria in Policy P-9 it is difficult to say based on the plot plan submitted by the

Applicant that Council had sufficient information respecting parking, adequate recreational open space and proper buffering adjacent to a designated institutional use. Of particular concern is paragraph (iv) of Policy P-9 which requires that the development be located on arterial or collector streets on the Transportation Map. The map shows the Old Sydney Highway as a proposed minor collector. While both Morris Lloyd and Chris Leach testified that the Old Sydney Highway met the requirements of a collector and that the word "proposed" doesn't change its designation, the Board accepts the argument of Appellant's counsel that it is not a collector road until it has been designated as such. A proposal is only an indication that sometime in the future Council may designate it as a collector. An amendment to the M.P.S. is required to designate the Old Sydney Highway as a minor collector.

With respect to Implementation Policy I-10 the Board has particular concern with clause (ii) of paragraph (b) - the adequacy of sewer and water services to support the proposed development. Mr. Emms gave a thorough and understandable explanation of the water and sewer systems of the Town. He expressed the opinion that there is a more than adequate supply of water and the Board accepts his opinion. He did, however, point out that there are problems with water pressure in the Summit Park subdivision which is near the subject property. He testified that if the Applicant hooks up to the Pitt Street Reservoir which services Summit Park, there would be problems with water pressure in the apartments, particularly on the 3rd floor. When asked for his professional opinion he stated that this would not be an adequate water service. The Board accepts his opinion. Mr. Emms suggested that if the Applicant chose instead to hook up to the Tamarac Drive Reservoir which services other areas of the Town that the proposed building would not be subject to water pressure problems even though some properties serviced by the Tamarac Drive Reservoir do experience water pressure problems. In his evidence, Mr. MacRae stated that he does not believe there is any water pressure problem and the Board takes from his evidence that it is his intention to hook up to the Pitt Street system and not the Tamarac system which would be more costly to him. Without a commitment from the Applicant that he would connect the building to the Taramac Drive Reservoir, the proposal is inappropriate due to the inadequacy of the water service from the Pitt Street Reservoir. The other criteria in Policy I-10 do not appear to have been considered by Council.

On an appeal under Section 63 of the Planning Act the Board's power is restricted by subsection (5) as follows:

> "63(5) The Board shall not allow the appeal unless the Board determines that the decision of the Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy."

The Board is of the opinion that Council's decision cannot reasonably be said to carry out the intent of the Municipal Planning Strategy because the criteria respecting collector streets and the adequacy of water services have not been satisfied and Council has not fully considered all relevant policies in the M.P.S.

The Board allows the appeal and reverses the decision of council amending the Land Use By-law and rezoning the subject property.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 8th day of February, A.D., 1988.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

RE: CHURCH STREET PRESERVATION SOCIETY v. TOWN OF ANTIGONISH

PLANNING - L.U.B. AMENDMENT - APPROVAL OF REZONING FROM R-1 TO R-3 - WHETHER AGGRIEVED PERSON - WHETHER REASONABLY CARRIES OUT INTENT OF M.P.S. PLANNING ACT SS 63; 63(1)(A)(a); (S.N.S. 1987 c. 51); 63(5); TOWN OF ANTIGONISH M.P.S. POLICIES P-4, P-6, P-121(ii)(f);

This is an appeal from a decision of Antigonish Town Council rezoning lands on Church Street from (R-1) to (R-3) to permit the conversion of a large existing single home (and addition thereto) to create six bachelor apartments. The Appellant is an unincorporated body made up of a few members who reside in the immediate neighbourhood of the subject property.

The Applicant here was the Appellant in Mary Frances Murphy v. Town of Antigonish NSMB-566-87-P (unreported). One A.A. made a presentation in favour of this appeal and he was the Applicant in that case.

The subject property lies within the Town's Municipal Planning Strategy (M.P.S.) area and is not designated as heritage property.

HELD: The Board held the Appellant was an aggrieved person. The Board dismissed the appeal and confirmed the decision of Council.

The C.S.A. & P. Society is an "aggrieved person" Under Section 63(1A) since it was an unincorporated society made up of a majority of members who were aggrieved persons. Most members resided in the immediate neighbourhood. All who were brought to the Board's attention were aggrieved persons in their own right.

M.P.S. provides for conversion of single family homes into multiple dwellings provided the character of the building is not fundamentally altered. There is no prohibition against converting historic buildings. The subject property has not been designated a historic building under Town's Heritage By-law. Council has to decide if it is satisfied that the proposal is submitted in good faith and that the intention is to convert and not to demolish and rebuild.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, being Chapter 9, of the Statutes of Nova Scotia, 1983, as amended;

- and -

IN THE MATTER OF: An Appeal by **THE CHURCH STREET AND AREA PRESERVATION SOCIETY** from a decision of the Council of the **TOWN OF ANTIGONISH** made September 3, 1987, which amended the Town's Land-Use By-law by rezoning approximately 45,000 square feet of land located at 86 Church Street, Antigonish, from Residential First Density (R-1) Zone to Residential Multiple Density (R-3) Zone on the application of **MARY FRANCES MURPHY.**

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: EILEEN HENRY and DAVID SMITH on behalf of the Appellant;

ALEXANDER G. MacDONALD, LL.B., on behalf of the Town;

WILLIAM MURPHY, Q.C., on behalf of the Applicant.

DECISION

A hearing was held by the Board on January 28, 1988, in Council Chambers in Antigonish on an appeal by **THE CHURCH STREET AND AREA PRESERVATION SOCIETY** from a decision of the Council of the Town of Antigonish made September 3, 1987, which amended the Town's Land-Use By-law by rezoning approximately 45,000 square feet of land located at 86 Church Street, Antigonish, from

Residential First Density (R-1) Zone to Residential Multiple Density (R-3) Zone on the application of **MARY FRANCES MURPHY.** The purpose of the rezoning is to permit the conversion of her single family home into 6 apartment units. An addition to the rear of the existing house is proposed.

The Notice of Appeal is dated September 23, 1987, and was received by the Board on September 28, 1987. The Notice of Appeal is signed by **EILEEN HENRY** as agent for the Appellant. William Murphy, Q.C., Solicitor for the Applicant, raised an objection at the commencement of the hearing that the Appellant was not an "aggrieved person" within the meaning of Section 63 of the Planning Act. Section 63 was amended by S.N.S. 1987 c. 51, by adding a new subsection (1A), which came into effect August 1, 1987. This new subsection defines "aggrieved person" to include an "unincorporated organization of which the majority of its members are persons who are aggrieved pursuant to clause (a)". Mrs. Henry produced a list of persons (Exhibit A-7, the introduction of which was objected to by Mr. Murphy,) who were concerned about the rezoning. Most of these persons reside in the immediate neighbourhood of the subject property. The evidence suggests that these are only a few actual members of the Church Street and Area Preservation Society of Antigonish. The Board was satisfied that those members were aggrieved persons within the meaning of clause (a) of subsection (1A) of Section 63 of the Planing Act and held that the Appellant was an aggrieved person. The Board further determined that it had jurisdiction to hear the appeal.

During the hearing a question was raised about an error in the 1st Notice of Hearing published before the Public Hearing. While the Notice contains an error and some notifications of the change should probably have been included in the second hearing, it was clear from the evidence that no one was prejudiced as a result of the error.

Mary Frances Murphy, the Applicant, is the owner of a large single family home on a large lot on the west side of Church Street, the subject property. She and her husband purchased the property in 1941. The house was built sometime after 1880. It is very attractive and appears to be well maintained. There are a number of older homes along Church Street some of which are shown on a circa 1865 map of Antigonish Town which was introduced as Exhibit A-10. Some of the large homes on Church Street have been converted to apartment uses. As well a funeral home and a day-care centre are located on Church Street in the vicinity of the subject property.

By letter dated June 5, 1987, Mrs. Murphy wrote to the Clerk-Treasurer applying to rezone her property "for the purpose of erecting a 6-unit apartment building on the site". An application for rezoning was also signed by Mrs. Murphy. In the section of the form entitled "If New Building Proposed, Give Specifications and Details" there has been nothing filled in. No plans accompanied the application and none were submitted to Council nor at the hearing of this appeal. According to the minutes of both the Planning Advisory Committee and the Public Hearing, Mrs. Murphy's intention is to convert the existing house and add an addition to the rear to create 6 apartments. In her evidence at the hearing of the appeal Mrs. Murphy stated that it was her intention to divide the house down the central hall, add an addition and create bachelor units. She testified that she intends to continue to reside in the house.

Mrs. Henry, the agent for the Appellant, resides on the east side of Church Street. Alan Armsworthy, who made a presentation at the conclusion of the evidence, resides on Church Street opposite the subject property. He is the owner of another property on Church Street which was the subject of an appeal to the Board in 1987: Mary Frances Murphy v. Town of Antigonish NSMB-566-87-P, May 4, 1987 (unreported). In that case Mr. Armsworthy applied to rezone his property, after demolishing the existing house, from Residential First Density (R-1) Zone to Residential Multiple Density (R-3) Zone and Mrs. Murphy appealed the rezoning. The Board overturned Council's decision but subsequently the property was rezoned to R-3. According to the Board's decision, Eileen Henry testified in support of the rezoning. While at first blush, it would appear that this appeal was initiated as a response to Mrs. Murphy's original appeal, there are, in fact, issues of concern relating to the rezoning of the subject property.

The Municipality has a Municipal Planning Strategy, (hereinafter referred to as the "M.P.S.") which was reviewed and approved by the Minister of Municipal Affairs in September, 1983. Policy P-4 of the M.P.S. specifically provides for the conversion of single family dwellings to multiple family dwellings. The M.P.S. does not provide for development agreements.

In addition to Eileen Henry, David Smith testified on behalf of the Appellant. Both Mrs. Henry and Mr. Smith raised the issue of what controls there were on the redevelopment of the subject property once the rezoning to Residential Multiple Density (R-3) Zone had taken place. They were concerned that the size of the lot, approximately 45,000 square feet, would permit a considerably larger number of units than that being proposed by Mrs. Murphy. The witnesses noted that Mrs. Murphy had not submitted any plans and questioned whether there was anything to confirm that the proposal was to convert the existing house and not to demolish it and build new units. The Board is satisfied that Mrs. Murphy has made clear her intention both to Town Council and the Board to convert the existing house. The Board accepts that Mrs. Murphy has made her application to rezone in good faith.

As noted above, Policy P-4 of the M.P.S. permits the conversion of existing single family dwellings to more than two units or multiple family dwellings by amendments to the zoning by-law provided that the development conforms to the following criteria:

> (a) no addition or external alterations which would fundamentally alter the character of the building;
>
> (b) that it complies with all relevant criteria in

> Policy P-6; and
>
> (c) that it is consistent with the criteria in Policy P-121.

The Board is satisfied that clause (a) has been complied with. Policy P-6 sets out the criteria for new multiple dwellings. The Chairman of the Planning Advisory Committee, Ronald F. MacDonald, testified that the Committee had considered the criteria in Policy P-6 and P-121 and considered as well the impact of a larger development if the rezoning was approved.

One of the criteria in Policy P-121 which was raised by the Appellant and Mr. Armsworthy is clause (f) of paragraph (ii) which reads in part as follows:

> "P-121 On considering amendments to the Zoning By-law...Council shall have regard to the following matters:
>
> (ii) That the proposal is not premature or inappropriate by reason of:
>
> > (f) the potential for damage to or destruction of historic buildings and sites;"

The Town has had a Heritage By-law since December 16, 1986. The By-law provides for a Heritage Advisory Committee which has the power to recommend to Council that a building be registered as a Town Heritage Property. There has been only one property designated as a heritage property in Antigonish. The subject property has not been designated as a heritage property. The Board is of the opinion, however, that it is not necessary for a property to be designated as a heritage property before clause (f) of Policy P-121 will apply. The term "historic" is broad and can include a property such as the subject property. The question of whether or not the potential for destruction of the subject property is such that the proposal is inappropriate must be examined in conjunction with Policy P-4. Policy P-4 specifically permits the conversion of existing single family homes into multiple family dwellings provided the character of the building is not fundamentally altered. There is no prohibition against converting historic buildings only a limitation that the conversion must not alter the character of the building. Presumably the possibility is always there that once a lot has been rezoned from R-1 to R-3 to permit a conversion that there could be a subsequent demolition of the premises. Council has to decide if it is satisfied that the proposal is submitted in good faith and that the intention is to convert and not to demolish and rebuild. By permitting rezonings for conversions the Town has left open the possibility that sometime in the future the existing house will be demolished and the lot will be used to its full potential as an R-3 lot. If the M.P.S. had provisions respecting development agreements then the Council could use such an agreement to limit the future use of single family homes which have been converted to multiple family dwellings. The present M.P.S. does not put any limit on rezonings which are permitted by Policy P-4 except to the extent that any subsequent development will require a development permit and must therefore comply with the requirements of the Town's Zoning By-law. The Chairman of the Planning Advisory Committee testified as did the Development Officer that there was some control which the Town could exercise over subsequent development of properties which were rezoned as conversions by the requirement to obtain a development permit.

On an appeal under Section 63(5) of the Planning Act, the "Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy". The Applicant applied to convert her single family home to 6 apartments. Policy P-4 states that it is the intention of Council to permit such conversions. While it is possible that at sometime in the future the subject property could be redeveloped this is no different than the situation with respect to any rezoning that is granted pursuant to Policy P-4. The Board finds that Council's decision carries out the intent of the municipal planning strategy.

The appeal is dismissed and an Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 3rd day of March, A.D., 1988.

Linda D. Garber

LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD

MEHTA v. TOWN OF TRURO

PLANNING - DEVELOPMENT PERMIT - REFUSAL - CHARTER OF RIGHTS - PLANNING ACT, S.S. 78(3).

This is an appeal by N.M.M. from a decision of the Development Officer for the Town of Truro which refused to issue a development permit to establish a medical office and commercial use on Willow Street. The Appellant had earlier applied for a development permit for the same property. It was refused and he was unsuccessful on an appeal to the Board (see (1986) 5B, M.B.D. 527). Prior to applying for the second permit, it was suggested that the Appellant apply for a minor variance. He did not do so. The Appellant argued that his rights under Section 15 of the Charter of Rights had been violated. As an alternative, the Appellant requested that the matter be referred back to the Development Officer.

HELD: The Board dismissed the Appeal. The Board requested the Town to forward a new application for a development agreement and a minor variance to the Appellant.

The Appellant's application is essentially the same as the one which was the subject of the earlier appeal and which was held to be inconsistent with the L.U.B. The Board did not have jurisdiction to make a ruling respecting Section 15 of the Charter of Rights. Under Section 78 of the Planning Act the Board has no power to refer a matter back to the development officer for further consideration.

NSMB-594-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, S.N.S., 1983, C. 9, as amended;

- and -

IN THE MATTER OF: An Appeal by **DR. NAVIN M. MEHTA** from the decision of **PETER NELSON**, Municipal Development Officer for the **TOWN OF TRURO**, made September 8, 1987, which decision refused an application for a municipal development permit to establish a medical office and commercial use for property located at Civic Number 248 Willow Street, Truro.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: DAVID FARRAR, LL.B., for the Appellant;

DAVID GRUCHY, Q.C. and FAISAL JOSEPH, LL.B., for the Town of Truro.

DECISION

A hearing was held by the Board on February 9, 1988, in Truro on an appeal by **DR. NAVIN M. MEHTA** from a decision of Peter Nelson, Development Officer for the Town of Truro, made September 8, 1987, which decision refused an application for a development permit to establish a medical office and commercial use for property located at Civic Number 248 Willow Street, Truro.

The subject property was purchased by Dr. Mehta in 1985 and he applied for and received a rezoning from R-2 to C-2. In September, 1985, Dr. Mehta and his wife moved their businesses into the subject property, these businesses being a medical office and a computer company. They were then advised that they would have to apply for both a building permit and a development permit. The application for a development permit was refused and Dr. Mehta appealed the refusal to the Board. The Board in Mehta v. Town of Truro (1986) 5B, M.B.D. 527, dismissed the appeal. The decision was issued November 19, 1986 and Dr. Mehta applied for Leave to Appeal to the Appeal Division of the Nova Scotia Supreme Court and this application was denied by the Appeal Division on January 29, 1987.

Sometime prior to August 11, 1987, Dr. Mehta was served with a summons to answer to charges relating to his use of the subject property. (The Board was not advised as to the outcome of these proceedings). On August 11, 1987 Dr. Mehta attended with his solicitor, William Ryan, at the office of the Development Officer and filled out an application for a development permit. In a letter dated September 8, 1987, Peter Nelson, Development Officer, refused the application for a development permit on the following grounds:

> 1. Failure to show compliance with Section 5.7 of the Land-use By-law;
>
> 2. Failure to show compliance with Section 9.1 of the Land-use By-law; and
>
> 3. Failure to show compliance with Section 5.1(b)(ii) of the Land-use By-law.

Dr. Mehta received the letter of refusal on September 9th or 10th, 1986, and appealed from this second refusal. A Notice of Appeal dated September 24, 1987, was filed with the Board on September 24, 1987. The grounds of appeal are as follows:

"1. THAT Section 9.1 of the Land-Use By-law is contrary to the provisions of the Municipal Development Plan;

2. THAT the Municipal Development Officer, in reaching his decision, failed to consider the non-coforming use being made of the neighboring property;

3. THAT the provisions of Section 9.1 of the Land Use By-law are inapplicable where the abutting property is used for non-conforming use;

4. THAT the decision of the Municipal Development Officer is contrary to the Municipal Planning Strategy;

5. THAT the decision contravenes the equality provisions of Section 15 of the Charter of Rights and Freedoms in that other Municipal Development Permits have been issued to other parties without fulfilling the requirements of Section 9.1 of the Land Use By-laws;

6. THAT the Town of Truro by its knowledge and actions in re-zoning this property to C-2 has waived its right to rely on the provisions of Section 9.1 of the Land Use By-law."

At the beginning of the hearing, Mr. Farrar, on behalf of Dr. Mehta, raised the issue of whether or not the Board could deal with the fifth ground of appeal which raises Section 15 of the Charter of Rights and Freedoms. He made a motion to adjourn the proceedings so that his client could make an application to a Court, if the Board felt that it did not have jurisdiction to deal with the issue. Mr. Gruchy, on behalf of the Town, objected to an adjournment.

The Board ruled that it did not have jurisdiction on this appeal to make a ruling respecting Section 15 of the Charter. The Board noted that there had been no request by the Appellant to hold a preliminary hearing on this issue or even a prehearing conference. The Board determined that the hearing should proceed as the parties were in attendance and it would not preclude the Appellant from pursuing a separate application pursuant to the Charter if he so wishes.

Mr. Farrar also raised in his preliminary comments the issue of whether the Board had power to send the application back to the Development Officer for further consideration. The Board stated that its powers were restricted to those set out in Section 78(3) of the Planning Act which provides as follows:

> "78(3) The Board shall
>
> (a) confirm the decision of the municipal development officer; or
>
> (b) allow the appeal by ordering that the permit be granted, but no permit shall be granted that is inconsistent with the land-use by-law, an agreement entered into pursuant to Section 55 or 56, or a provincial land-use regulation."

The Board has no power to refer a matter back to the development officer for further consideration.

Mr. Gruchy made a motion that the evidence be restricted to evidence relating to the second application. After discussion it was agreed that the Board could refer to the facts as set out in the previous Board decision referred to above and that the evidence presented at this hearing would be restricted to the time following the issuing of the Board's decision on November 19, 1986.

Mr. Farrar stated at the beginning of the hearing that most of the Appellant's evidence was intended to show that there had been a violation of Dr. Mehta's rights pursuant to Section 15 of the Charter and since the Board had ruled that it could not deal with that issue, that evidence would not be adduced.

Dr. Mehta was the sole witness at the hearing. There were three Exhibits: the application for a development permit, dated August 11, 1987, 26 photographs showing various buildings and their parking lots in the Town of Truro, and a letter to Faisal Joseph, a solicitor for the Town, from William Ryan, solicitor for Dr. Mehta. The Board was provided with a copy of Sections 5 and 9 of the Land-use By-laws by the Appellant. It was suggested by Mr. Gruchy that the Board could obtain a copy of the Municipal Planning Strategy and the Land-use By-law from the Board's file in the earlier appeal. Mr. Gruchy stated that the relevant sections of the M.P.S. and L.U.B. had not changed. The Appellant did not object. The Board did obtain a copy of the M.P.S and the L.U.B. from the earlier file and reviewed the documents.

It is clear from reading the facts set out in the earlier decision and from hearing Dr. Mehta's testimony that the relationship between Dr. Mehta and Mr. Nelson, the Development Officer, is strained. Apparently, Dr. Mehta thought that Mr. Nelson would forward him a copy of the application form immediately following the last appeal and when this did not occur he attended at the Town Office with his solicitor and filled out the application on August 11, 1987.

In a letter dated August 13, 1987, Mr. Ryan wrote to Faisal Joseph and set out what additional information Mr. Nelson required to be filed. The August 13, 1987, letter also contains the following paragraph:

> "When discussing the problem with parking, Mr. Nelson suggested that Dr. Mehta might be able to apply for a variance of the requirements and I have requested that Dr. Mehta do that as quickly as possible."

In the Board's earlier decision reference is also made at page 569 to Mr. Nelson's suggestion of a minor variance.

Dr. Mehta did not apply for a minor variance. When asked on cross-examination why he had not applied for the minor variance Dr. Mehta stated as follows:

> "The variance requested of me is to tear down part of my building so that I could use only a portion of my building in which case a variance would be considered, not granted...I did not want to tear down my building."

There was no evidence presented as to the basis for Dr. Mehta's belief that a minor variance would require that a portion of his building be torn down other than Dr. Mehta's reference to "Mr. Nelson's variance".

Without the application for a minor variance, Dr. Mehta's application is essentially the same as the one which was the subject of the earlier appeal. In that case, Mehta v. Town of Truro, supra, the Board determined at page 569 as follows:

> "The permit sought, if granted, would be inconsistent with the Land-Use By-law of the Town. The Board therefore, pursuant to S. 78(3)(a) of the Planning Act confirms the decision of the Municipal Development Officer of the Town made March 19, 1986, refusing the Appellant a municipal development permit for 243 Willow Street."

There have been no changes to the Land-Use By-law since the earlier decision. The various grounds of appeal deal with issues which are not within the jurisdiction of the Board on an appeal under Section 78 of the Planning Act. The Board has no choice but to reach the same decision as in the earlier case.

Mr. Gruchy in his closing remarks stated that the Town had extended the offer to co-operate in this matter and that it still extends this offer. The Board recommends that the Town ensure that a new application for a development permit is forwarded to Dr. Mehta, together with an explanation of what a minor variance might require in this case. While the Board recognizes that Dr. Mehta may wish to pursue other legal avenues, it seems appropriate that he at least consider applying for a minor variance.

An Order to dismiss this appeal will issue accordingly.

DATED at HALIFAX, Nova scotia, this 4th day of March, A.D., 1988.

Linda Garber
LINDA D. GARBER
Vice-Chairman

NOVA SCOTIA MUNICIPAL BOARD.

STONE ET AL v. CITY OF HALIFAX AND CLAYTON DEVELOPMENTS

PLANNING - DEVELOPMENT AGREEMENT - WHETHER REASONABLY CARRIES OUT INTENT OF M.P.S. - LAND USE - HIGH RISE APARTMENTS - SHOPPING CENTRE - IMMEDIATELY ADJACENT - PLANNING ACT, s. 71 - CITY OF HALIFAX M.P.S. POLICIES 52.4, 2.4.1, IMPLEMENTATION POLICY 10.

This is an appeal by W. S. et al from a decision of Halifax City Council which approved entering into a development agreement for 112 acre site to be developed for mixed residential use and a 200,000 square foot shopping centre. The Appellants reside in Bridgeview and are concerned about increased traffic, the incompatibility of apartment buildings and the inclusion of the shopping centre. A 4-lane boulevard separates Bridgeview from the proposed development. At the hearing it was discovered that the land where the shopping centre is to locate had not been designated future commercial. The area designated future commercial on the Gen. FLUM is a block away.

HELD: The Board allowed the appeal and referred the matter back to Council because the inclusion of a major shopping centre was inconsistent with the intent of the M.P.S.

Land a block away from a future land use designation on the Gen. FLUM is not "immediately adjacent" to it. It is not contiguous to or so close to the other object as to be almost in contact with the designated land use. An Amendment to the M.P.S. is required. The integrity of a neighbourhood will not be affected by two 13 storey apartment buildings where park lands and a 4-lane boulevard separate them. The fact that some residents of the proposed development may choose to use residential streets rather than travel on principal streets does not mean that the developer has violated the M.P.S.

NSMB-600-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, being Chapter 9 of the Statutes of Nova Scotia, 1983, as amended;

- and -

IN THE MATTER OF: An Appeal by **WILLIAM STONE, PAMELA ANDERSON, SUZANNE BORKOWSKI, JOHN CHIASSON, GORDON McMILLAN, CLIVE PATTISON, WILLIAM PIERS, GEORGE REID, JOHN WELLS** and **DAVID WILLIAMSON** from a decision of the Council of the **CITY OF HALIFAX** made the 15th day of October, 1987, approving entering into a development agreement with **CLAYTON DEVELOPMENTS LTD.** respecting 112 acres of land located west of Dunbrack Street, east of the Nova Scotia Power Corporation right-of-way, north of the Dunbrack Street/Lacewood Drive intersection and south of the Dunbrack Street/Langbrae Drive intersection.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: WILLIAM STONE, GEORGE REID, GORDON McMILLAN and CLIVE PATTISON representing themselves and all of the Appellants;

PETER McDONOUGH, Q.C. and ANNE UTEK, LL.B., for the Developer, Clayton Developments Ltd.

BARRY ALLEN, LL.B., for the City of Halifax.

DECISION

A hearing was held by the Board on March 7th and 8th, 1988, on an appeal by **WILLIAM STONE, ET AL,** from a decision of the Council of the City of Halifax made October 15, 1987, which approved entering into a development agreement with **CLAYTON DEVELOPMENTS LTD.** respecting lands which are located on Dunbrack Street in Mainland North and are included in lands identified as

Schedule "K" on the City of Halifax Zoning Map, dated March, 1978. Schedule "K" lands are subject to Section 68 of the Land-Use By-law - Mainland Area (hereinafter referred to as the "L.U.B.").

Clayton Developments Ltd. owns or has under option 420 acres of land west of Dunbrack Street and east of the Bicentennial Highway all of which is identified as Schedule "K" lands. The land is to be developed over the next 25 years in phases. The development is called Clayton Park West. The first phase to be developed is a 112 acre parcel west of Dunbrack Street, east of the Nova Scotia Power Corporation right-of-way, north of the Dunbrack Street/Lacewood Drive intersection and south of the Dunbrack Street/Langbrae Drive intersection. The proposal calls for a mix of residential uses including 36 single family units, town houses, semi-detached, 2, 3, 4 and 6 storey multiple family units, senior citizens units and two 13-storey apartment buildings. This phase also includes park lands and a 200,000 square foot shopping centre proposed for the corner of Lacewood Drive and Dunbrack Street.

The Appellants all reside in an area known as Bridgeview which is located to the east of Dunbrack Street, opposite the area where the high rise buildings are planned. Bridgeview does not extend to Dunbrack Street, both a city owned park and a training area for firemen are located between Bridgeview and Dunbrack Street.

The Board heard eight witnesses. Two of the

Appellants, John Wells and George Reid testified. Moira Leiper, Alderman for Ward 10, was called by the Appellants. An objection was made by the solicitor for the City that questions relating to how and why the various members of Council voted should not be permitted. The evidence from Ms. Leiper was limited to the traffic situation and proposed solutions. It was noted on cross-examination that Bridgeview was in Ward 12 and that no residents from Ward 10 were listed as Appellants nor were in attendance at the hearing although Ward 10 would be affected by increased traffic from the proposed development.

The Appellants called Bill Campbell and he was qualified as an expert in planning matters. He is the Development Administrator for the City and prepared most of the staff reports which were presented to Council and which were introduced as exhibits. It should be noted that all the staff reports which were filed as Exhibits were in favour of the project.

The Appellants also called Frank Palermo who teaches at the Technical University of Nova Scotia and is head of the Department of Urban and Rural Planning. Mr. Palermo was also qualified as an expert in planning matters. He is a member of the Halifax City Planning Advisory Committee (hereinafter referred to as "P.A.C."). The proposal was reviewed by the P.A.C. and Mr. Palermo raised several major concerns about the development of land in that part of the City. He feels that the City should develop its own concept of how the lands between

Dunbrack Street and the Bicentennial Highway are to be developed instead of relying on the developer's concept. He felt that the P.A.C. should have addressed some of these concerns before returning the application to Council. His specific concerns were with traffic, servicing, cost-benefit analysis and the development of a coherent open space system. He also testified that he believed that the developer had done a commendable job and had done what he felt the City should have done, i.e. develop a concept plan for the lands.

Mr. Robert Shaw, the President of Clayton Developments Ltd. testified and outlined the proposal and his view of the impact on the other neighbourhoods in the area. Mr. Donald Mason, President of Planners Atlantic Ltd. and Maurice Lloyd, Vice-President and Manager of the Atlantic Region of UMA Engineering Ltd. were both qualified as experts in planning matters and testified on behalf of Clayton Developments Ltd. Both men felt that the proposal was in compliance with the M.P.S. and the L.U.B. Mr. Lloyd gave an overview of the development in the metropolitan area since the introduction of the Halifax-Dartmouth Regional Development Plan in April 1975. He felt that this area was one which should be developed in preference to areas on the other side of the harbour, given the bridge traffic and the fact that this land was serviced.

The City called Bill Campbell back to the stand as its sole witness.

All the witnesses were in agreement that the proposal will increase traffic in the Bridgeview area and the other nearby neighbourhoods. Some witnesses believed that the traffic would increase whether or not the project went ahead because of traffic from the Bedford/Sackville area seeking alternatives to using the bridges. All witnesses agreed that if the City had approved the proposed Lacewood Connector that the traffic situation would have been alleviated to some extent by its construction. Some witnesses felt that the phasing in of the proposal over 9 years for the first phase and over 25 years for all phases would provide the City with an opportunity to find solutions to the traffic problems.

The Notice of Appeal is dated November 13, 1987, and was received by the Board on that date. There are a number of grounds of appeal which focus on various policies set out in the City's Municipal Planning Strategy (hereinafter referred to as the "M.P.S."). Most of the evidence presented by the Appellants dealt with the incompatibility of the proposal to the existing neighbourhoods by reason of traffic, over-supply of shopping centres and the inclusion of two high rise buildings in the proposal. Concern was also raised over density and parklands.

At the request of the developer, a prehearing conference was held on February 11, 1988, and at that time the Appellant asked whether or not the City or the Developer would be objecting to their status as aggrieved persons pursuant to Section 71(1A) of the Planning Act. By letter dated February 25, 1988, Mr. McDonough advised the Board that the Developer would not be objecting to the Appellants' status. At the hearing Mr. Allen advised the Board that he was not objecting to the Appellants' status. The Board determined that the Appellants were aggrieved persons within the meaning of Section 71(1A) of the Planning Act.

Subsections (3), (4), (5) and (6) of Section 71 of the Planning Act set out the Board's powers on an appeal from a decision by Council to approve the entering into of a development agreement and provide as follows:

> "(3) The Board shall determine whether the proposed agreement is consistent with the intent of the municipal planning strategy.
>
> (4) The Board shall
>
> (a) confirm the decision of the Council;
>
> (b) make any decision the Council could have made; or
>
> (c) refer the matter back to the Council for further consideration.
>
> (5) The Board shall not interfere with the decision of the Council unless the decision cannot reasonably be said to be consistent with the intent of the municipal planning strategy.
>
> (6) The Board shall not make any decision pursuant to clause (b) of subsection (4) which commits the Council to make any expenditures with respect to the development."

The M.P.S. in Schedule II.1 identifies the lands in question as a "soft area" which is not subject to detailed area planning. The City has, as an alternative to detailed area planning, established a separate process for lands identified as Schedule "K" under Section 68 of the L.U.B. These lands may only be developed through a development agreement. Any proposed use is to be primarily residential with an emphasis on a mix of housing types. Section 68 sets out the various uses which may be included. Included in the list of uses is (d) apartment houses, (g) commercial uses and (h) local commercial uses intended for the use of residents of the immediate area. The Section further provides that the application shall be submitted in a two-stage process, the first stage being a tentative plan showing the entire area of land owned by the Applicant. The second stage is for approval of the particular area which is to be developed. In this case, the Applicant submitted a master concept plan of the whole of Clayton Park West and surrounding areas for Stage 1 approval and in addition was seeking Stage 2 approval for the 1st phase of the development, the 112 acre site described above.

One of the issues raised by the Appellants is the inclusion of a 200,000 square foot shopping centre in the development. The Appellants argued that a shopping centre of this size does not come within the scope of commercial uses which may be permitted within a Schedule K development. No one disputed this fact. Mr. Campbell agreed that the usual procedure would be to require an amendment to the M.P.S. and the Generalized Future Land Use Map (hereinafter called the "Gen. FLUM") to permit a major shopping centre in Schedule "K" lands. Mr. Campbell, however, stated that the Gen. FLUM already provides for a major commercial development in the subject area. The

Appellants argued that the commercial land use designation on the Gen. FLUM was on the southside of Lacewood Drive and did not apply to the subject site. An examination of the Gen. FLUM shows a major commercial land use designation to the south of the proposed development on the west side of Dunbrack Street beginning at the intersection of Dunbrack Street and Clayton Park Drive and running north. Although this area was designated as a major commercial land use it has been developed as a residential area. The Clayton Park Shopping Centre borders on this designated area. The proposed shopping centre is located at the intersection of Lacewood Drive and Dunbrack Street, directly opposite the Clayton Park Shopping Centre.

At every stage of the approval process the shopping centre was considered as a separate item from the rest of the proposed development. The notices of hearing for both the Public Hearing and for the Appeal made specific reference to the shopping centre and its proposed location. The initial Staff Report (Exhibit S-1) which was prepared for Council stated that the commercial land-use designation on the Gen. FLUM was located at the intersection of Lacewood Drive and Dunbrack Street and included the subject property. At the Public hearing of September 9, 1987, there was a great deal of attention paid to the issue of the shopping centre. A report prepared by Maloe Given Parsons Ltd., which questioned the advisability of adding another shopping centre in Mainland North, was presented by First City Shopping Centre Group, the owners of the Clayton Park

Shopping Centre. City Staff reviewed this report in a Supplementary Report to Council (Exhibit S-3). A further report prepared by U.M.A. Group on this issue was submitted to Council by the Applicant, Clayton Developments (Exhibit S-21). There was also a letter from the solicitor for First City Shopping Centre Group (Exhibit S-19) which challenged the conclusions in the Supplementary Staff Report. A review of Council Minutes and the various documents referred to above indicates that all parties had proceeded on the basis that the property was subject to the existing commercial land-use designation. Implementation Policy 10 was never referred to. It appears to the Board that it was only at the appeal level that there was a recognition that the commercial land-use designation on the Gen. FLUM was located south of the proposed development.

The Appellants had assumed that the Gen. FLUM was the same as a zoning map on which the various zoned are fixed and which cannot be moved without an admendment approved by Council. Mr. Campbell testified that in his opinion a land-use designation on the Gen. FLUM could be moved and could apply to the proposed development. He further stated that he thought that this approach had been used to approve the Clayton Park Shopping Centre. Mr. Campbell did not cite any specific M.P.S. policy to support his position.

The Board has reviewed the M.P.S. Implementation Policy 10 of the M.P.S. specifically provides that a given land use designation on the Gen. FLUM may apply to "immediately adjacent" land. The Policy reads as follows:

> "10. An area immediately adjacent to a given land use designation on the Generalized Future Land Use Map (Map 9) may be considered for a rezoning, or for a development... for a use which is similar in nature to the given designation without requiring an amendment to this Plan, provided that the intents of all other policies of the Plan are satisfied."

In examining this policy the question must be asked is the proposed site "immediately adjacent" to the commercial land use designation on the Gen. FLUM? The Privy Council defined "adjacent" in Mayor of Wellington v. Mayor of Lower Hutt, [1904] A.C. 773 at page 775 as follows:

> ""Adjacent" is not a word to which a precise and uniform meaning is attached by ordinary usage. It is not confined to places adjoining, and it includes places close to or near. What degree of proximity would justify the application of the word is entirely a question of circumstances."

The term "immediately adjacent" was judicially considered in an American case, City of Lawrenceburg v. Maryland Casualty Co., 64 S.W. 2d. 69, 71, 16 Tenn. App. 238, which was cited in Words & Phrases, 5th Series, 1932-39, Vol. 3. In that case the Court had to determine what was included in an insurance policy which covered accidents on "ways immediately adjacent" to streets, etc. Words & Phrases states as follows:

> "while the word "adjacent" in its natural and primary sense means near to or neighbouring, and does not import physical contact with something else as does the word "adjoining", yet when qualified by the word "immediately", it necessarily means contiguous or so close to the other object as to be almost in contact therewith."

In the Board's opinion the use of the word "immediately" limits the area in which a Gen. FLUM land-use designation can be applied. The proposed shopping centre is not "contiguous to or so close to the other object as to be almost in contact" with the commercial land-use designation on the Gen. FLUM and therefore cannot be considered "immediately adjacent" to it.

Section 71(5) of the Planning Act places a restriction on the Board that it "shall not interfere with the decision of Council unless the decision of Council cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy". In this case Council did not make a decision on the issue of whether the proposed shopping centre was located "immediately adjacent" to a given land-use designation since Council was advised that the subject property was within the commercial land use designation on the Gen. FLUM. Council was not asked to apply Implementation Policy 10. The Board, therefore, cannot find that Council's decision was reasonably consistent with the intent of the M.P.S. It appears to the Board that an amendment to the M.P.S. is required before the shopping centre can be approved.

The Appellants argued that two 13-storey apartment buildings should not be included in the development. Initially the proposal was for two 15-storey buildings. The developer reduced the height prior to Council giving its approval. The apartment buildings, are to be located adjacent to Dunbrack Street with some tree cover between the buildings and Dunbrack Street. Dunbrack Street is a four-lane boulevard. As noted above, there are non-residential uses along Dunbrack Street immediately opposite the areas where the apartment buildings are to be built. These non-residential uses, a city park and training area for firefighters, contain some tree coverage. In the case of one of the apartment buildings, its proposed foundation will be 900 feet from the first house behind the park. The second building is not set back as far from Dunbrack Street and it will be somewhat closer to the homes in Bridgeview. Despite the setback and the tree coverage there is no question but that the top half of the buildings will be visible to some extent. The height of high rise buildings are regulated by the City's angle controls and the two proposed buildings do not exceed the angle controls.

The objective of the policies respecting Residential Environments in the M.P.S. is as follows:

> "The provision and maintenance of diverse and high quality housing in adequate amounts, in safe residential environments, at prices which residents can afford."

The development of Schedule "K" lands requires a mix of residential uses. There are existing high rise buildings on Dunbrack Street. When asked at the hearing Mr. Shaw stated that the company is proposing that the two buildings be developed as 2-bedroom units for either the rental or condominium market. Both the overall objective and the uses for Schedule "K" lands permit high rise apartment buildings. Some of the policies under the heading Residential Environments deal with maintaining the integrity and stability of existing neighbourhoods. The

Appellants argued that permitting high rise buildings will affect the integrity and stability of their neighbourhood and that they are not compatible with their neighbourhood. The various policies in the M.P.S. seem to be directed to developments within a specific neighbourhood as opposed to the development of adjacent neighbourhoods with the exception of Policy 2.4 which reads as follows:

> "2.4 Because the differences between residential areas contribute to the richness of Halifax as a city, and because different neighbourhoods exhibit different characteristics through such things as their location, scale, and housing age and type, and in order to promote neighbourhood stability and to ensure different types of residential areas and a variety of choices for its citizens, the City encourages the retention of the existing residential character of predominantly stable neighbourhoods, and will seek to ensure that any change it can control will be compatible with these neighbourhoods."

The issue then is whether or not these two high rise apartment buildings can be said to be incompatible with the Bridgeview neighbourhood. This is not a case of a high rise being built on the next lot or the next street. There is a 4-lane boulevard and park lands between the proposed sites and the Bridgeview neighbourhood. It is the Board's opinion that the distances are such that these two high rises cannot be considered to be incompatible with the Bridgeview neighbourhood. The Board does not believe that the integrity of the Bridgeview neighbourhood will be affected by these high rise buildings.

The Appellant's major concern is increased traffic. As noted above all witnesses agreed that the development will have an impact on the traffic which goes through Bridgeview and also through Clayton Park. The majority of people who eventually move into Clayton Park West will in all likelihood be employed in downtown Halifax and will join the morning and afternoon traffic which already uses streets in Bridgeview and Clayton Park. In addition there is likely to be an increase in traffic within Mainland North of persons travelling to and from the new shopping centre which because of its size is likely to draw a wider group of persons than the two existing shopping centres on Dunbrack Street. The argument was made by some witnesses that the commuter traffic will increase regardless of whether the development goes ahead because of persons travelling from the Bedford/Sackville area and using the streets in Mainland North as an alternative route to downtown Halifax.

In policy 2.4.1 of the M.P.S. it is stated that stability of neighbourhoods is to be maintained by "routing future principal streets around rather than through" neighbourhoods. Map 8 in the M.P.S. sets out the "principal streets". It also shows those "principal streets" which have not been accepted. One of the unaccepted principal streets is the Lacewood Connector referred to above. Dunbrack Street is shown as a principal street. The developer does not propose that any of the streets in Phase I will be principal streets. Traffic from the area is directed through two collector streets to Dunbrack Street. One of these collector streets is an extension of Lacewood Drive. The second collector joins Dunbrack Street where it intersects with Bridgeview South.

Given that Dunbrack Street is a limited access road, it is not possible to have the collector street intersect Dunbrack at another location.

The Bedford Highway, the Bicentennial Highway and the Saint Margaret's Bay Road are all shown on Map 8 as principal streets which intersect with Dunbrack Street and which lead into downtown Halifax. Can it be said that by placing the entrance of a connector street to Dunbrack Street at the intersection with Bridgeview South that the developer is "routing future principal streets...through" Bridgeview? In the Board's opinion it cannot.

The Board can appreciate the Appellants' concerns about increased traffic but there is nothing in the proposed development which is in violation of the policies in the M.P.S. dealing with traffic. The fact that some residents of Clayton Park West may choose to use residential streets in Bridgeview rather than travel on the principal streets does not mean that the developer has violated the M.P.S. The evidence at the hearing was that the City has taken some steps to improve the traffic situation and the phasing in of the development will allow the City additional time to pursue other traffic options.

The Appellants also argued that Phase I did not contain the required amount of parkland. The Halifax Recreation Plan contains policies for parks. Policy 5.14 provides as follows:

"POLICY 5.14

For neighbourhood and community parks, the City shall use the following guidelines as to size, service area, location, access, and population served. Design of individual parks shall attend to the characteristics of the population intended to be served:

TYPE OF PARK	ACRES PER 1000 PEOPLE	IDEAL SIZE OF SITE	RADIUS OF AREA SERVED	LOCATION	ACCESS
Neighbourhood	2	1-5 acres	¼ mi. or 5 min.walking distance	within residential ares & in visible location	by local streets & walkways, not cut off by barriers such as regional roads, truck routes, rail lines, or commercial or industrial uses
Community	3	5-20 acres	½ mi. or 10 min.walking distance.	where possible, in conjunction with schools	

City staff estimate that Phase I will require 15 acres of parkland. Phase I has 6 acres of neighbourhood parks which meets the requirements of Policy 5.14. Community parks, according to the guidelines, are to be much larger than neighbourhood parks and are to be located "where possible", in conjunction with schools. The overall plan of Clayton Park West calls for a school site to the west of the Nova Scotia Power Corporation right-of-way with a large park area adjacent to it. The development agreement provides that the developer is to dedicate 9.2 acres of this intended park land to the City as part of the Phase I development. These 9.2 acres will satisfy the requirements for community parks in Phase I and will provide a park area for the residents of Phase I regardless of whether the other Phases proceed. City staff also noted in their report (Exhibit S-1) that those persons who will reside in the portion of Phase I which is south of Lacewood Drive will be served by the Mainland North Commons. The Appellants argued that the developer was not complying with the requirements since the community park is not within the confines of Phase 1. The developer is, however, required to dedicate these 9.2 acres as part of the development of Phase I. The Board does wish to note that although the Staff Report states that these 9.2 acres are to be dedicated to the City within 2 years from the date of execution of the agreement, the text of the proposed agreement which is attached to the Report is silent as to when the dedication is to take place.

The Appellants also raised questions about the density of Phase I. Some confusion arose because of the fact that in calculating the overall density of Phase I, it is necessary to include the proposed shopping centre which brings the density to 33 persons per acre which is the maximum sewage capacity in the area. When the shopping centre is removed from the equation the density is 26 persons per acre which is in line with other developments in the area.

The Board has reviewed the other policies in the M.P.S. which were cited in the Notice of Appeal and does not find any which violate the intent of the M.P.S.

In the Board's opinion the inclusion of a major shopping centre in the proposed development is inconsistent with the intent of the M.P.S. The Board, therefore allows the appeal and refers the matter back to Council for further consideration.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 31st day of March, A.D., 1988.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

PENNER v. DISTRICT OF EAST HANTS

PLANNING - L.U.B. AMENDMENT - REFUSAL TO REZONE FROM R-2 AND O1 TO C-1 TO PERMIT FARMER'S MARKET - BUFFERING.

This is an appeal by WP from a decision of the Council of the Municipality of the District of East Hants refusing to rezone lands on Highway No. 2 in Elmsdale from General Residential and Environment Open Space Floodplain Low Potential Zones to Commercial General Zone. Existing building unserviced and used as a farmer's market. The Appellant wishes to increase the size of the market and service the building.

HELD: Appeal Dismissed.

This is not a case of ribbon development but merely infill in area in which ribbon development is already established. Insufficient buffering of immediately adjacent residential lands to protect them from adverse intrusion from either the proposed or potential commercial use of the land.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: **The PLANNING ACT**, being Chapter 9 of the Statutes of Nova Scotia, 1983, as amended;

- and -

IN THE MATTER OF: An appeal by **WALTER D. PENNER** Appellant, from a decision of the **COUNCIL OF THE MUNICIPALITY OF THE DISTRICT OF EAST HANTS**, made on October 13th, 1987, which decision refused to amend the Municipality's Land Use By-law by rezoning Lot 85-2, E.H. Plan No.3637 Route 2, Elmsdale from General Residential (R-2) Zone and Environmental Open Space Floodplain Low Potential (01) Zone to Commercial General (C-1) Zone

BEFORE: RICHARD L. WELDON, Member

COUNSEL: WALTER D. PENNER, the Appellant, on his own behalf
ROBERT G. CARRUTHERS on behalf of the MUNICIPALITY OF THE DISTRICT OF EAST HANTS, a Respondent;

DECISION

Pursuant to Section 16(1) of **CHAPTER 9, S.N.S. 1981, THE MUNICIPAL BOARD ACT,** the Chairman assigned Board member Richard L. Weldon to hear this planning appeal at the Board's March 14, 1988 sittings at the Council Chambers of the Municipality of the District of East Hants, Milford, N.S. commencing at 10 A.M.

A Notice of Appeal (Exhibit P-1) was filed with the Board on October 28,1987. Included in that Notice of Appeal was an agreement to pay the cost of advertisment of the Notice of Hearing.

The Notice of Appeal, dated and delivered to the Board October 28,1987, alludes to a decision of the Council of the Municipality of the District of East Hants, made on October 13th, 1987, which decision refused to amend the Municipality's Land Use By-law by rezoning Lot 85-2, E.H. Plan No.3637 Route 2, Elmsdale from General Residential (R-2) Zone and Environment Open Space Floodplain Low Potenial (01) Zone to Commercial General (C-1) Zone but incorrectly alleges that the rezoning "was requested by me on the 28th day of October, 1987." Counsel present made no comment over this apparent discrepancy. All evidence brought before the Board was quite clear in identifing just what decision of Council was before the Board on appeal.

The Notice of Appeal states its grounds as follows:

> "The grounds of my appeal are:
>
> The application is inconsistent with good planning practices and principles in general and with the spirit and intent of the Corridor District and Mount Uniacke District Integerated Land Use By-Law [sic] in specific. The Municipal Council has used improper grounds and wrong standards in refusing the rezoning."

All jurisdictional facts necessary to establish the Board's jurisdiction to hear this appeal on its merits have been proven to the satisfaction of the Board, and the Board therefore determines that it has jurisdiction to hear this appeal on its merits.

The subject land to be rezoned is part of a lot of land lying to the south east of Provincial Trunk Highway Number 2 (hereinafter referred to as Highway #2) at Elmsdale located within in the Municipality of the District District of East Hants. The whole lot is graphically shown on a copy of a "plot" plan "Land of Paul Senter & Lawrence Jessome" made by Michael A. Allison, N.S.L.S.(COPY UNDATED) and forming part of the "Municipality's Booklet", so-called by the Board, being Exhibit P-7. On this plan the lot has an 80' frontage on Highway #2 and runs south-easterly slighly under 300' towards the Shubenacadie River. Before it can reach the river, the lot ends at the intervening north west adjacent boundary line of the C.N.R. railway right-of way (the main rail line leading from Halifax out of Province). The lot is almost rectangular in shape.

At present, the lot contains a shell-type building located on the center portion of the lot. This building has none of the amenities of piped services and has been used, in season, as a farmers' market. To the east of the lot is a lot occupied by a residential duplex building still under construction as of the time of the Board's view. To the west of the lot is a similar completed duplex dwelling

At present the Lot is zoned as follows:

1. A strip of the lot abutting Highway #2 is zoned R-2 and has no buildings on it.
2. Adjacent to that strip of the lot is another portion of the lot zoned Environmental Open Space Floodplain Low

Potenial (01) Zone. The shell building is presently located on this portion of the lot and the present commercial use of that portion of the lot is apparently a permissible use of that zone.

3. Adjacent to that and extending for the remaining portion of the lot is land which is zoned Environmental Open Space Floodplain High Potenial (01) Zone.

In summary, the proposal giving rise to this rezoning application seems to the Board to be as follows:

1. The adjacent R-2 and Floodplain Low Potential zones on the subject lot were to be rezoned to C-1.

2. The Floodplain High Potential zoned area on the lot was to be left as is in respect to its zoning.

3. The rezoning would allow the Appellant to utilize the whole of the remainder of his lot, outside of the Flood Plain High Potential zone, for the purpose of building and using a pipe serviced building on the rezoned area and relocation of the present shell building on the rezoned portion of the lot. By this building improvement the Appellant will enable himself and his fellow church members carry on an improved farmers' market on the rezoned area in the appropriate seasons.

4. As part of the proposal, the Appellant would be able to improve the service to the customers of the market by increasing the size and quality of the buildings, by

improving the on-site parking, and by improving or getting rid of the present somewhat unsightly shell building.

5. The proposal, when completed, would provide greater and better working facilities for those who have to work in the farmers' market.

6. The proposal, if completed, would allow the market to handle more and better varieties of farm produce the better to service both farmer-producer and the customer-consumer.

The Board believes the 6 points listed above are a fair approximation of the proposal, and its objectives, as stated by the Appellant.

After considering this proposal, and holding a public hearing on the proposal, the Council of the Municipality (hereinafter called the "Council") decided to refuse the rezoning requested.

In the various minutes and documents given in the Municipal Booklet (Exhibit P-7) the following objections to the proposed rezoning were made:

1. That the proposed rezoning was contrary, because of its location, to the integrated planning strategy and that the Appellant should seek an alternate location for the proposed use, one which did not violate that strategy.

2. That the land proposed to be rezoned commercial was too small and too close to immediately adjacent residential properties on each side of it and on the opposite side of Highway #2. Because of the commercial use intended for the

subject property, those surrounding properties would be devalued by the imposition of the proposed use amongst them.

3. That the recommendation to Council from P.A.C. was to "consider", not to "approve".

Council split 50/50 on the motion to approve the rezoning and the Warden cast the deciding vote against the motion to approve which was then defeated.

Hence this appeal.

Mr. Penner called as his witnesses Brad Hodgins, Councillor Joseph Macdonnell and Clarence Friesen. David Frank and Councillor Curtis Clarke gave evidence, each on his own behalf . Mr Carruthers, for the Municipality, called no evidence on its behalf, but listed several recent rezonings in the vicinity at the request of the Board.

Brad Hodgins, planner for the Municipality, was qualified as an expert in planning matters entitled to give opinion evidence in planning matters as they affected the Municipality.

Mr. Hodgins was the author of the recommendation to Council, contained in Exhibit P-7, to rezone the subject property as being a proper rezoning falling within the intent of the M.P.S. Mr. Hodgins said the main defect in the proposed rezoning was the possibility that the commercial use of the subject property would be incompatible with the closely surrounding residential uses. Mr. Hodgins, after some hesitation, was of the opinion that the possible incompatibility was not of sufficent severity to prevent the rezoning from falling within the intent of the M.P.S.

Mr. Hodgins said that the more widespread area in the vicinity of the subject property was "a mixed urban area", although predominantly residential. Mr. Hodgins tried to delineate on a sketch map (Exhibit P-12) the ownerships and uses of the individual landholdings within 500' of the subject property. He noted the large industrial property of the Elmsdale Lumber Company located accross the road and just east of the subject property. He noted certain commercially zoned properties located just three or four properties to the east of the subject property on the same side of the road. Mr. Hodgins noted some industrial properties located six or seven properties to the west of the subject property on the same side of the road.

Mr. Hodgins noted, as well, that the the properties on each side of the subject property were zoned and used for duplex residential construction. He said that the properties immediately across the road from the subject property were residences.

In cross-examination by Mr. Carruthers, Mr. Hodgins dismissed the "worst case scenario" of being rezoned commercial for the subject lot because the configuration of the lot would prevent much more extensive commercial use of the subject lot than that which was contemplated by the present proposal.

Even if one concedes that the present rezoning proposal is within the intent of the M.P.S. (asked Mr. Carruthers) was the refusal decision of Council also within that intent? Mr. Hodgins conceded that it possibly might be.

On questioning by the Board, Mr. Hodgins said his staff would be able to prepare a sufficiently detailed description of the two portions of the subject lot proposed to be rezoned so that the rezoning amendment would have a sufficently precise definition for inclusion in itself. He admitted that, although there were stakes on the east and west boundaries of the subject lot indicating the southernmost extension at those points of the rezoning proposal, the southernmost boundary of the rezoning proposal had not been set with any degree of precision.

Councillor Joe MacDonnell, lawyer, had voted to approve the present rezoning application. He could not see that the present rezoning was any different than the one recently approved by Council for a Mr. Jessome's property some 200' east of the subject property on the same side of the road. The Jessome rezoning, after approval by Council, was subjected to a "citizen's appeal" to the Board (David Frank et al v. the Municipality of the District of East Hants NSMB-587-87-P_1) which had confirmed the decision of Council to rezone.

Councillor MacDonnell feels there is a demand for a farmers' market on the subject property.

Clarence Friesen of Northfield, the next witness, didn't know which municipal councillor represented the District in which the subject property is located. He stated that there was a demand for a farmers' market in the area. He felt the rezoning would allow the expansion of the farmers' market on the site to include the exposure of many more farm products for sale.

David Frank, a MT&T manager, near neighbour of the subject property, testified on his own against the proposed rezoning.

Mr. Frank noted that the radius on Exhibit P-12 was skewed so that it included more commercial and industrial properties in its so called 500' radius from the subject property than if the radius were properly positioned on Exhibit P-12. He wondered how a planner who so skewed such a simple plan could give accurate planning advice which Council and the Board should follow.

Mr. Frank said that the subject property was changed in 1982 to a residential zone from an industrial or commercial zone and he didn't see why it should be rezoned so soon back to a commercial use.

Mr Frank mentioned various other rezonings that had recently been allowed along Highway #2 and noted that the developments promised thereon had not been built.

In response to questions from the Board, Mr. Frank said the present commercial use on the subject property (a small scale farmers' market in a shell building on the middle portion of the lot for 5 days a week) had not looked very busy. He doubted the present operation was viable from a conventional economic sense. Mr. Frank doubted that an expanded farmers' market (the present proposal) would fare any better economically.

Councillor Curtis Clarke, retired, spoke in favour of the Board sustaining the Council's refusal of the rezoning.

Councillor Clarke read from, or alluded to, the following portions of the M.P.S. (Exhibit P-8) in his evidence:II Preface p4, Management of Growth p10, P-1.5 Objectives p14, "All policies" p17 (bottom), "Change..." p20, G.F.L.U.Map methodology p38, Citizen Participation paragraph 29 p39, Business community centralized paragraph 8 p40, p41, Elmsdale-Tannery Brook paragraph 222 p53, Not radiating from the village core paragraph 3 p54.

Councillor Clarke listed various rezonings which have occurred in the area as a result of previous Board decisions, noted that these rezonings have not resulted in any development to date, and stated that he felt that some of the proposals for development mentioned in those contested rezonings were mere ploys to obtain rezoning for the purpose of raising the value of the undeveloped land. He felt the expressed intent in some zoning applications might not always be the real intent behind the rezoning.

Councillor Clarke felt the proposed commercial use could not, on the narrow lot in question, be properly buffered to prevent it from unduly conflicting with the existing residential uses on the adjacent lots.

At the Board's request, and with the consent of all parties present, Mr. Carruthers read into the record a summary of all the recent rezoning applications in the area which met the following criteria:

1.were rezoned from some other zone to commercial,and

2.had not been appealed to the Board,or

3.were refused by Council and had been appealed to the Board,or

4. were approved by Council, and were appealed to the Board and

5.were not the present appeal.

The list (with the results in each case to date of the list) is as follows:

1.David Frank $_1$, supra, a Council approved rezoning (O-1 to C-1), approved on appeal to the Board and finished there.

2.Kenneth Parkin et al v. Municipality of the District of East Hants NSMB-574-87-P$_2$, in which Council refused a rezoning from R-2 to C-1 and an applicant appeal to the Board which allowed the sought for rezoning on appeal.

3. Russ J. Andrews v. Municipality of the District of East Hants NSMB-586-87-P leave to appeal granted S.C.A.01903 sometime in January 1988 [appeal allowed and a partial

rehearing ordered as of March 30,1988 after the compilation of Mr. Carruther's list[13],a Council decision allowing a rezoning from R-2 to C-2 reversed by the Board on appeal, and at least partially reversed again by the Appeal Division of the Supreme Court in which a partial rehearing by the Board is ordered but not yet held.

4. There were two other successful applications to rezone to Council from R-2 to C-1 which succeeded and were not appealed anywhwere.

According to Mr. Carruthers there were other like zoning applications to Council which were turned down and which were not appealed. These applications did not fit within the criteria outlined in the Board's request for a list.

Mr Carruthers list was followed by closing arguments from Mr. Penner and Mr. Carruthers. On the way to Halifax from the hearing, the Board did a "windshield" view of the subject lot.

On this appeal the Board must adhere to the powers set out for it under the Planning Act and more particularly the following portions thereof:

> "63(1)...the refusal by a council to amend or revise the land-use by-law pursuant to subsection 1(a) of Section 51 may be appealed by
> ...
> (b) the applicant;
> ...
> (3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy.

(4) The Board may

(a) confirm the decision of council;

(b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law;or

(c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board.

(5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy.

...

(7) Notwithstanding subsections (5) and (6), the Board may allow an appeal by an applicant if, in the opinion of the Board,

(a) the applicant would suffer undue hardship;or

(b) extraordinary or compelling circumstances are present."

There has been no evidence tendered of undue hardship to the Appellant and there is no evidence of extraordinary or compelling circumstances so the appeal cannot succeed because of ss 7(a) or (b) of Section 63 of the Planning Act.

Perhaps because of the pressure of development in the Elsmdale area, as noted above, there have been a fair number of appeals in planning matters in somewhat close proximity to the subject land. The Board will look quickly to the decisions in those appeals to see what assistance , if any, they can give the Board in arriving at a decision herein.

David Frank[1] rezones a 2.48 acre site vacant immediately opposite the Elmsdale Lumber Mill. All the area to be rezoned was in an Environmental Open Space:Floodplain Low Potential (01) zone and proposed for C-1 zoning. The rezoning was granted. After examining the criteria for rezoning contained in the M.P.S., the Board at p10 of the filed decision says this:

> " While the Board is sympathetic to the position of Mr. and Mrs. Frank who live in the residential area which is adjacent to the Appellant's property, the Planning Strategy does contemplate the type of rezoning for which the Appellant applied.
>
> For the above reasons, the Board has determined that the decision of Council reasonably carries out the intent of the [p11] Planning Strategy...."

The land dealt with in David Frank_1 is very close to the subject land (about 3 small lots away to the east). It is much larger in size (about 5 times) than the the lot to be rezoned in this case. Procedurally the rezoning in David Frank_1 was supported by the planner, followed by PAC, followed by Council. In the present case, the planner and PAC appear to favour the rezoning-Council, with the barest of majorities, does not.

The land in David Frank_1 is "adjacent" to the Appellants' residential lands but it is also "adjacent" to the Elmsdale Lumber Yard. In the present case, the smaller subject lot is "immediately adjacent" to similar sized residential uses.

Councillor MacDonnell says the David Frank_1 result should indicate the outcome of the present appeal. In the view of the Board, there are enough differences in the facts of the two cases that the outcome of David Frank_1 does not necessarily determine the outcome of the present appeal.

Parkin_2 is a Board decision which makes the Board take closer notice than did David Frank_1

since there are many similarities in planning procedure in Parkin$_2$ to the present appeal. In Parkin$_2$ the planner recommended the rezoning, the Council refused the rezoning, and the Board ordered the Council to approve the rezoning.

After a consideration of the M.P.S. and the evidence in Parkin$_2$, the Board at p25 of the filed decision gets to the meat of Parkin$_2$:

> "...The Board, however, notes that policy P9-1 (subparagraph (b) (vii) which warns against the creation of a ribbon development pattern and this is a policy on which he relies [to defeat the rezoning].... The Board, however, regards this particular [p26] development as merely being infill in which the ribbon development is already established for whatever reason. The Board therefore rejects Mr. Carruthers' attempt to sustain the decision of Council under the prohibition against ribbon development in the M.P.S.
>
> As noted before, it is conceded that the area is all surrounded by residential properties but the buffering that will be provided for, and can be enforced by, the regulations will be adequate to protect the immediately surrounding properties....[p27] The decision of Council is not founded on principles set out in the MPS thus the decision of Council cannot be found to reasonably lie within the intent of the MPS and therefore the Board... determines that the decision of Council cannot reasonably be said to carry out the intent of the Municipal Planing Strategy...."

Councillor Clarke, in the general thrust of his evidence, tends to hold the position that Parkin$_2$ was wrongly decided (His delicate position, if the Board understands it correctly, is that the Parkins "hoodwinked" the Board into assisting them in a scheme to enhance the raw value of their land by rezoning.) and that the Board should find no guidance in its previous decision of Parkin$_2$ when arriving at its decision in the present appeal.

On one plane of understanding, it is easy to see Councillor Clarke's point of view. The other commercial uses and zones alluded to in Parkin$_2$ were much further distant from the subject property there than are the commercial and industrial properties to the subject land in the present appeal. In Parkin$_2$, the land on either side of the subject property, and behind the subject property, was built up in residences. In the present appeal, the subject land has residential buildings on either side of it but behind the subject land is the railroad right-of way.

In Parkin$_2$ the land adjacent, across the road, was vacant. In the present appeal the land across the road is built up in residences.

Again there are differences between the subject property and the property rezoned against the wishes of Council in Parkin$_2$ [the Board will recur to those differences when it concludes its findings herein]. Thus the Board need not necessarily adopt Councillor Clarke's extreme position of disowning the decision in Parkin$_2$ in order, if it so wished, to come to a decision favourable in result to Councillor Clarke's point of view. The Board is of the opinion that the result of the decision in Parkin$_2$ is not necessarily a determinate for the result in the present appeal.

Parkin$_2$'s decision has a Schedule A which contains excerpts from the relevant M.P.S. and Land Use By-law

(L.U.B.) which are relevant to the present appeal and the Board will not repeat them in this decision.

Andrews$_3$ could have been the most helpful decision, from a legal guidance point of view, to the Board because the rezoning process therein contained has been reviewed by the planner, P.A.C., Council, the Board, one Appeal Court Judge in Chambers, and three Appeal Court Judges constituting a bench of that Court on appeal.

The decisions of Council and the Board are available to the Board (and in conflict) but, at the time of this writing, neither the decision of the Appeal Court Judge in Chambers, nor the decision of the Appeal Bench is available to the Board, in typescript. The few notes from Board counsel reporting the results of the Appeal Bench verbal decision (which is all the Board presently has) seem to indicate that the decision of the Board was reversed in part by the Appeal Bench and that a partial rehearing of the appeal on limited issues was ordered. No copy of the Appeal Court Rule [is it now order?] has been delivered to the Board, and the Board has, as yet, no copy of the Appeal Bench's apparently unanimous oral decision. The Board has taken some steps to obtain typescripts of the reasons and the results for the Appeal Bench's decision in Andrews$_3$, without results to date.

Additionally, at the hearing of this appeal during the closing arguments, Mr. Carruthers, the only counsel learned in the law making argument, was asked by the Board whether the same issues to be determined in this appeal were currently before the Appeal Division on appeal and hence whether the Board should defer this present appeal's decision until the Appeal Bench's decision in Andrews[3] was delivered. [At that time the Bench decision alluded to had not yet been made.] Mr. Carruthers submitted that the issues before the Appeal Bench were different than those outstanding in the present appeal, and he saw no need to delay the decision in this appeal in the hope of receiving determinate guidance from the Appeal Bench's decision in Andrews[3]. The Board, therefore, with some reluctance proceeds to the conclusion of this decision without any Appeal Court guidance from Andrews[3]' decision.

The Board has viewed the site, listened to all the evidence, and perused the exhibits before it.

The Board is satified that the present rezoning application, like that in Parkin[2], is not a case of "ribbon development" { and thus in violation of M.P.S. P-9-1 (vii)} but is "merely infill in an area in which the ribbon development is already established for whatever reason." In the aspect of "ribbon development", the rezoning in question here is fully within the intent of the M.P.S. and if, and to the extent, the decision of Council in this appeal were based on objections to "ribbon development" that base for the decision of Council would clearly be contrary to the intent of the M.P.S. and thus could not be used to sustain the decision of Council.

In the opinion of the Board, the application to rezone on the facts of this appeal stands or falls on Policy 9.2 (v) "adequately buffered where required."

Mr. Hodgins, the plannner, after some hesitation on this point, came to the opinion that there would be , under the regulations, adequate buffering of the immediately adjacent residential uses from the commercial uses intended or permitted on the subject property by the proposed rezoning. Council had that planning advice before it when it made its narrow decision against rezoning. Council had the benifit of the decisions of the Board in Parkin[2] and David Frank[1] available to it, if it wished to peruse the same, before it decided against rezoning in the present case: from the evidence before the Board at least two of the councillors concerned had taken care to inform themselves of the contents of those two decisions before voting on the resolutions herein. From the minutes of Council, it is clear that all councillors present at the meeting were made aware that there had been, in the past, appeals to the Board on planning matters.

The Board has warned in many previous cases that councils should not disregard the planning advice of their professional planners for reasons not founded in the intent of the M.P.S.

From the evidence of David Frank, from its own view of the site, from the fact that the area to be rezoned is only about 1/2 acre and the fact that the immediately adjacent like sized lots are now fully occupied almost to their side yard limits with residential dwellings, the Board has come to the conclusion that there will likely be insufficent buffering of those immediately adjacent residential lands to protect them from adverse intrusion from either the proposed or potential commercial use of the land proposed to be rezoned. Therefore the Board finds that the proposed rezoning is contrary to Policy 9.2 (v) of the M.P.S. (as there is no adequate buffering) and the proposed rezoning does not reasonably fall within the intent of the M.P.S. Since Council rejected this rezoning, it becomes clear that, pursuant to Section 63 (3) of the Planning Act the Board determines that the decision of Council reasonably carries out the intent of the M.P.S.

Pursuant to Section 63 (4) (a) of the Planning Act the Board confirms the decision of Council refusing the rezoning applied for by the present Appellant.

Pursuant to Section 29 of the Municipal Board Act, the Board dismisses the appeal herein.

An order will issue accordingly.

DATED AT HALIFAX this 8th day of April, 1988.

RICHARD L. WELDON

MEMBER

SCHEDULE A

SOME CITATIONS

1 David Frank et al v. the Municipality of the District of East Hants NSMB-587-87-P

2 Kenneth Parkin et al v. Municipality of the District of East HantsNSMB-574-87-P

3 Russ J. Andrews v. Municipality of the District of East Hants NSMB-586-87-P leave to appeal granted S.C.A.01903 sometime in January 1988 [appeal allowed and a partial rehearing ordered as of March 30,1988]

PELLY v. TOWN OF BRIDGETOWN

PLANNING - L.U.B. AMENDMENT - REFUSAL TO AMEND - DECISION OF COUNCIL, WHETHER REASONABLY CARRIES OUT INTENT OF M.P.S.- MUNICIPAL BOARD ACT S. 16(1); 25(1); - PLANNING ACT, SS. 63(1)(b); 63(2); 63(3); 63(4); 63(4)(a); 63(5); 63(7)(a)(b).

This is an appeal by V.P. for a general change (not site specific) in Bridgetown's L.U.B. to allow "Ladies Boutique" use in a residential zone and for a change in the parking requirements in such a zone. She proposed to use 280 square feet on the second floor of a house (in an R-1 Zone) to start a ladies boutique. Commercial uses are permitted in the residential zone. There was no written Planner's Report. Minutes of P.A.C. and Council made no specific reference to M.P.S. policies.

Notice of Hearing was not advertised as ordered by the Board.

HELD: The Board dismissed the appeal and confirmed decision of Council.

The local paper did not advertise Notice of Hearing as originally requested by the Board's Clerk. The newspaper published the first and last advertisement but missed the middle one. Many people from the Town attended the hearing. The Board otherwise ordered that the two insertions were sufficient.

Bridgetown M.P.S. encouraged retail development in downtown core area. Planning advice in Bridgetown is provided by a District Planning Commission. The Planner in his opinion said the proposal was not within the intent of the M.P.S. because onsite parking was insufficient and it would provide for unwarranted retail intrusion into residential zones.

The basic duty of the Board is to see if the decision is within the intent of the M.P.S. Good documentary evidence of planning advice rendered by the Planner to Council assist the Board in reaching a correct decision.

The Board held somewhat reluctantly the decision of Council fell within the intent of the M.P.S.

NSMB-3-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, Statutes of Nova Scotia, 1983, as amended;

- and -

IN THE MATTER OF: An Appeal to the Nova Scotia Municipal Board by **VALERIE PELLY,** from a decision of the Council of the Town of Bridgetown made the 4th day of January, 1988, which decision denied the amendment to the Land Use By-law for the Town of Bridgetown to permit a ladies clothing boutique at 81 Granville Street in the Town of Bridgetown.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: PATRICIA BUCHHOLZ, LL.B., for the Appellant;

JOHN R. CAMERON, LL.B., for the Town of Bridgetown.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981, the Municipal Board Act, the Chairman assigned Board Member, RICHARD L. WELDON, to hear this planning appeal at the Board's March 22nd, 1988, sittings at the Council Chambers of the Town of Bridgetown, Granville Street, Bridgetown, Nova Scotia, (hereinafter referred to as the "Town").

The Notice of Appeal (Exhibit P-1) was signed personally by the Appellant, **VALERIE PELLY** dated January 23, 1988 and filed with the Board on January 25, 1988, and concerned "the decision of Bridgetown Town Council, made the 4th day of January, 1988, which decision denied the amendment to the Land Use By-law as proposed by **VALERIE PELLY** and **J. SHACKLETON**,...".

The Board assigned the Chairman to peruse the Notice of Appeal and to determine whether or not the Notice of Appeal complied with the Planning Act, S.N.S. 1983, Chapter 9, and the rules made thereunder as to the form and content of an appropriate Notice of Appeal. The Chairman took no objection to the Notice of Appeal as filed.

The Notice of Appeal appeared to describe the application of the Appellant as being a..."proposal to allow ladies clothing boutique or similar description of a retail land use to be added to the restrictive list of permitted business uses in residential zones. A further request for public consideration in reducing or eliminating the requirements for off-street parking for business uses in residential zones."

The Notice of Appeal went on further to set out its grounds of appeal as follows:

> "The grounds of appeal are as set out below:
>
> 1. That the decision of Council was inconsistent with the Municipal Planning Strategy as adopted by the Town of Bridgetown;
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> 2. That the proposed amendment is consistent with existing uses permitted within the dwelling in a residential zone;
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> 3. That the proposed use of the dwelling house is consistent with existing businesses in the area;
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> 4. That the Applicant has sufficient off-street parking, which point was brought to the attention of council on consideration of this matter.
>
> 5. That the Applicant will suffer undue hardship in

> that she would be required to locate the business in a high rental area."

As stated in the Notice of Appeal the decision appealed from refused applications to make a general change in the Zoning By-law of the Town by having an added category listed of "Ladies Boutique" to the list of permitted uses within a residential area and also of changing the parking requirements necessary to go along with the particular size of the lot owned and occupied by the Appellant. Both these changes are therefore changes in the general text of the Land Use By-law as opposed to a site specific change which is the type of rezoning more commonly heard by the Board on appeal where a specific area of the Town would be, for example, zoned from R-1 to C-1 or some such change.

The Application was made in the context of a residential home situated on a residential lot in a residential area owned by the Appellant, Valerie Pelly, being 81 Granville Street in the Town.

The appeal seeks to have the Board reverse the decision of the Town Council (hereinafter referred to as the "Council"), made January 4, 1988, in which the type of amendment to the By-law mentioned above was refused by Council.

The appeal came on for hearing at 10:00 o'clock on March 22, 1988, at the Council Chambers of the Town, pursuant to a Notice of Hearing (Exhibit P-3) signed by DOREEN WHITE, Clerk of the Board, and dated February 22, 1988.

Service of the Notice of Hearing was properly and adequately proven by various Affidavits filed under Exhibit P-5.

It appeared from the tear sheets from the Monitor, a newspaper published in the Town, that the Board's instructions to the Monitor concerning the publication of the Notice of Hearing had not been followed in that one of the three consecutive weekly insertions (which are the norm for these matters pursuant to the Board's specific written instructions and pursuant to Section 25(1) of the Municipal Board Act which reads as follows:

> "Notice of any hearing shall be given by advertisement in one or more newspapers circulating in the municipality affected by the subject-matter of the hearing for three consecutive weekly insertions preceding the date of the hearing unless otherwise ordered by the Board.")

It had not been published as instructed.

It appears from the Board's instructions and from telephone conversations recited by Ms. White, Clerk of the Board, that the failure of the newspaper to follow its instructions was not caught in sufficient time to comply with Section 25(1) or the written instructions. This matter was discussed by the Board and counsel for the Town, and counsel for the Appellant and all appeared satisfied that appropriate notice had been given to all interested parties. The Board is thus left with the alternative of exercising its powers under Section 25(1) in the phrase "unless otherwise ordered by the Board", or adjourning the hearing to allow for re-advertisement of the Notice of Hearing. The Board does so exercise its powers and "otherwise orders" that the two insertions of the advertisement be sufficient advertisement of the Notice of Hearing in this particular application.

The appeal was filed with the Board within time pursuant to Section 63(2) which reads as follows:

> "An appeal filed pursuant to subsection (1) shall be served on the Board within twenty-one days of the date of the publication of the notice of the adoption of the amendment or, in the case of a refusal to amend the land-use by-law, within twenty-one days of the date of the decision of the council."

These are the excerpts from the Planning Act Sections bearing on this appeal which bear quoting here: Section 63(1):

> "...the refusal by a council to amend or revise the land-use by-law pursuant to subsection 1(a) of Section 51 may be appealed by
>
> ...
>
> (b) the applicant;
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> ...
>
> (3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy.
>
> (4) The Board may
>
> (a) confirm the decision of the council;
>
> (b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law; or
>
> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board.
>
> (5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy.
>
> ...
>
> (7) Notwithstanding subsections (5) and (6), the Board may allow an appeal by an applicant if, in the opinion of the Board,

> (a) the applicant would suffer undue hardship; or
>
> (b) extraordinary and compelling circumstances are present."

The Appellant in this case is the person who applied to have the L.U.B. amended and thus she is an Applicant within the meaning of the above sections and has the status of an Appellant. Since all notices required including the Notice of Appeal had been filed and served in time, the Board therefore assumed jurisdiction to hear this appeal.

The area proposed to be developed by the Appellant has been very poorly described in evidence but has been viewed from the outside by the Board and is shown graphically on Exhibit P-9. The dwelling in question consists of a large two-storey house. There is some side-yard clearance and on the evidence before the Board there is space for the parking of two cars on the same lot in the backyard of that house. This house and apparent town-sized lot is located on Granville Street in the Town.

Ms. Buchholz called as her witnesses, Valerie Peily, her daughter, Julie Anne Shackleton, Barbara Porter, Fred Weidhaas, Nancy Pettit and Mike Rock. Mr. Cameron, on behalf of the Town, called Harvey Beviss, the Deputy Mayor, and Roger Sturtevant.

Both counsel made opening remarks to the Board and both counsel made closing arguments at the end of the evidentiary portion of the hearing. The Board adjourned the hearing at approximately 4:45 p.m., reserved its decision, and took a "windshield" view of the site. The Board is now delivering its reserved decision.

Mrs. Shackleton lives in the Town and is a daughter of the Appellant, Valerie Pelly. Mrs. Shackleton said that she was currently unemployed but she wished to go into partnership with her mother to have a ladies boutique put on the second floor of the dwelling house located at 81 Granville Street, Bridgetown.

Mrs. Shackleton had done no market studies but she wished to be in partnership with her mother, thought there was a need for the boutique and thought that the Bridgetown area would draw from other inhabited portions of the surrounding areas up to almost Kentville. She felt there was a real need in the Town and that the business would have very little general impact being really one bedroom and a couple of closets comprising in all around 280 odd square feet.

These ladies were proposing to open the boutique between 10:00 a.m. and 4:00 p.m. on business days to provide a retail clothing outlet for "more mature" women. Such an outlet was not at present available in the Town. Mrs. Shackleton felt that there would be a good market for this business and that the very low overhead (because of no rent) would allow them to experiment with the business to see if they could make a success of it over a period of time.

Mrs. Shackleton said that she and her mother had been sent by Town officials to certain properties in the downtown core to see if they were suitable for opening such a business. She felt that the facilities that either were now (or had been in the past) available were not suitable for the type of business or the scope of the business that she and her mother proposed to enter. Mrs. Shackleton felt that if the business grew as they hoped that they would have to move out of the house and move elsewhere, probably in the downtown core.

Mrs. Shackleton felt that the neighbours had been all canvassed within a 200-foot and, later, a 500-foot radius of her mother's house by herself and that there was relatively little public objection and that none of the business people in the general area objected to this very, very modest proposal that she and her mother had made, to go into business.

Mrs. Pelly, the mother of the previous witness, came on the stand and basically testified to the same intent as her daughter. Mrs. Pelly impressed the Board as having made perhaps a deeper investigation into the business problems and the market potential related to the proposed boutique: she still seemed eager to go on with the scheme.

Mrs. Pelly felt that there was at least 2 parking spaces available on her lot. She also felt that she had made arrangements for parking with the motel next door which had a large parking lot if there was any excess parking requirements for her rezoning. She adduced a petition, Exhibit P-10, showing the consent of many of the people in the Town to this proposed rezoning and she produced a letter, Exhibit P-13, which was a letter from the Bridgetown Motor Hotel next door to her property allowing her customer parking.

Mrs. Pelly was taken through the various restrictions of the Municipal Planning Strategy (M.P.S.) and felt that there was no problem in the rezoning from these various restrictions that were either in the M.P.S., Exhibit P-6 and P-7 combined or the Land Use By-law (L.U.B.). She felt that she met all these requirements and that the changes that she asked would be within all the parameters required and would not be upsetting in any respect. Mrs. Pelly said that she could not understand why the Council did not approve her plan, she never did understand their reasoning and she does not understand it today.

Mrs. Barbara Porter gave evidence. She is a former merchant who had done business in a very similar line (as is proposed here) in the Bridgetown Mall which has available retail space in the downtown core area. She said some of the vacant retail spaces suggested were not suitable for Mrs. Pelly's development and the particular mall space that was mentioned, as being now vacant, was totally inadequate. The suggested area was improperly serviced, too small in area, too small in display space, and, overall, it was not a suitable alternative site for the proposals of the Appellant. Mrs. Porter was strongly of the opinion that there is a decided market in Bridgetown to service Bridgetown and the surrounding areas for the type of ladies boutique service to be provided in the proposal of the Appellant.

Mr. Fred Weidhaas is a merchant in the downtown area. He started a small business in his own house at Round Hill (a rural area outside the Town) and when it got large enough he moved his business to downtown Bridgetown. He said that if he had not been able to start his business small (incubator style) at home he would have failed in the business within the first year. Now he has a successful business in downtown Bridgetown and he feels that Mrs. Pelly ought to be allowed to develop her business in the same way. If and when her business prospered she would have to move it downtown to obtain the then needed space. He further points out that any new business in Town would be of assistance in making "one-stop shopping" more suitable for the people who come to shop in Bridgetown. He felt it would be to his business advantage if Mrs. Pelly were allowed to open.

Nancy Pettit, 75 Granville Street East, said that she had lived six or seven years in the area near the Appellant's house and that, although it is a residential area, she feels the way the area is used (because of the various funeral homes, ambulance services, hotels, motor hotels and various small businesses) that there is a considerable commercial aspect to the properties within 500 feet of the subject property and that this little shop of Mrs. Pelly's won't make much difference. This residential - commercial mix was pretty well agreed to by all witnesses and is set out in some detail on Exhibit P-9.

Mike Rock, another businessman, of 56 Queen Street believes that small businesses should be allowed and that the Town is immoral in preventing them from being allowed. He also welcomed Mrs. Pelly's proposal for additional business within the Town.

Deputy Mayor Harvey Beviss is chairman of the Planning Advisory Committee (P.A.C.) and as well as chairman of the Finance Committee of the Town. The Deputy Mayor said the P.A.C., under advice from the planner who filed no written report, went over the entire checklist as required by the Land Use By-law and as required by the M.P.S. and said that the P.A.C., followed by the Council, considered all these aspects of the rezoning, felt that the particular proposal was not harmful in itself but the generic changing of the entire planning requirements of the Town both as to parking and as to permission of a retail use in a residential area would be going too far in a land use change. He felt that Council considered all the aspects of the rezoning before turning down the rezoning. The Deputy Mayor also mentioned traffic considerations. The Deputy Mayor conceded that any new business would be of advantage to the Town. On cross-examination, the Deputy Mayor was confronted with certain actions by certain councillors who had businesses in their homes which businesses didn't appear to fit within the Zoning By-law.

Roger Sturtevant is employed by the Annapolis Valley & District Planning Commission which provides planning services in the Towns of Middleton, Bridgetown and Annapolis Royal. He was qualified as an expert witness in planning and he reviewed the proceedings before Council which are minuted in what the Board chooses to call the Town Booklet, Exhibit P-8.

Mr. Sturtevant felt that the intent of the M.P.S. was to put most retail services in the downtown core, that the proposal was a bad proposal in that it would allow an unwarranted retail service to go into a residential zone. He said that the P.A.C. and Council had fully considered the proposal from all aspects.

Mr. Sturtevant further noted that he had made no written report to P.A.C. and Council and that it was not his policy to make written reports of his planning advice. He gave advice when he felt it necessary to give advice to P.A.C. and to Council and, of course, he gave them planning advice when he was asked. Mr. Sturtevant is the Planner and the Development Officer among his other duties for the Town.

In the opinion of Mr. Sturtevant, the decision of Council was reasonably within the intent of the M.P.S. and that the proposal of the Appellant was not within the intent of the M.P.S. because of lack of required on-site parking and because of the unwarranted retail intrusions into the residential zone.

Mrs. Pettit was called to give some rebuttal evidence.

The Board has reviewed the arguments, listened to the evidence and taken a short view of the site, once by car through the windshield and once by foot.

In Exhibit P-8 we find the only formal application made to Council that appears to be made by the Applicant and it is a letter dated November 18, 1987, addressed to a Mr. Hamilton:

> "We would like to make a request for an amendment to the Town By-laws on residential zoning and parking on Granville Street East.
>
> Our goal is to open a Ladies Boutique shop in the home of 81 Granville St., the room in which the business will be operated out of is twenty by fourteen feet.
>
> Our intentions are to carry a line of ladies clothing that will not in any way interfere with any other establishment in this area.
>
> We feel a business such as this will be beneficial to the Town and the people.
>
> We hope you will give this request your upmost attention.
>
> Sincerely yours,
>
> (Sgd.)
> Valerie Pelly
> Julianne Shackleton."

Mr. Sturtevant replied to this letter on November 23, 1987, as follows:

> "...your letter to the Town regarding a small retail ladies clothing establishment within the residence at 81 Granville Street was discussed. During this meeting criteria in the Bridgetown Municipal Planning Strategy and Land Use By-law was reviewed in light of your proposal. It was the consensus of the Planning Advisory Committee that your proposal for this retail enterprise was a needed one for the Town, however, unfortunately it appeared to be "the right use in the wrong place". In its preliminary findings, the P.A.C. felt that this business would cross the line into commercial retail usage of residential land and could initially create or develop attendent unwanted impacts on the neighbourhood.
>
> The Planning Advisory Committee expressed great interest in your proposal and would like you to pursue your ideas with the Bridgetown Business Improvement District Commission (BBIDC). The P.A.C. felt that a ladies clothing store such as the one you are proposing could fit into the commercially zoned areas of Town and possibly at a very reasonable lease or rental rate."

With this encouragement Mrs. Pelly proceeded. On the

Minutes of the regular meeting of the Town Council held on December 7, 1987, we have this excerpt:

> "Planning Advisory Committee
>
> The Town Council reviewed a letter received from Valerie Pelly and Julianne Shackleton, in which they are requesting an amendment to the Town of Bridgetown zoning by-law, which would permit them to open a ladies boutique shop in Mrs. Pelly's home at 81 Granville Street East.
>
> Mrs. Pelly addressed the Town Council advising that she wishes to open a ladies boutique shop in her home and that she feels that this is the only practical way to get this business going. Mrs. Pelly indicated that she does not feel from her own research that it would be feasible to try and open a speciality shop in the downtown due to the high overhead operating costs and therefore is requesting this change in the zoning by-law.
>
> Mrs. Pelly advised that she plans to convert a large upstairs bedroom which is approximately twenty feet by fourteen feet, to house this business.
>
> Mrs. Pelly advised that her operating hours would be from 10:00 a.m. to 4:00 p.m. and the employees would be herself and Mrs. Shackleton.
>
> On motion of Councillor Freeman seconded by Councillor Murphy, it was agreed that this request for an amendment to the zoning by-laws of the Town of Bridgetown be referred to the Planning Advisory Committee and that a Public Information Meeting be held in connection with this matter. Motion Carried.
>
> Deputy Mayor Beviss on behalf of the Town Council thanked Mrs. Pelly for her presentation."

A Public Information Meeting of the Town of Bridgetown Planning Advisory Committee was held regarding the application of Valerie Pelly and Julianne Shackleton on December 17, 1987. It is clear from the minutes of that meeting that the Applicant made an application, that the planner spoke, and:

"Considerable discussions ensued with respect to

> concerns about maintaining the integrity and quality of the Town Plan as well as permitting additional uses in a residential zone, to encourage small businesses which could incubate in a home, to a point where the viability of going downtown in the business district would be more favourable."
>
> General discussion ensued:
>
> "General discussion ensued on the application before the Planning Advisory Committee for rezoning of the Land Use By-law.
>
> It was moved by Vice-Chairman Wightman and seconded by G. Tupper, that the application submitted by V. Pelly and J. Shackleton to amend the Land Use By-law be denied.
>
> ...
>
> Motion Defeated.
>
> It was agreed by the Committee to delay a decision on the application until they can obtain legal opinion from the Town Solicitor regarding whether or not this addition to the permitted uses in a Residential Zone would be precedent setting and to what degree.
>
> It was agreed that the next meeting of the Planning Advisory Committee be held on Tuesday evening December 22, 1987, at 7:30 p.m. and that Town Solicitor Cameron be asked to be in attendance."

On December 22, 1987, the Planning Advisory Committee of the Town of Bridgetown had another meeting. The minutes show as follows:

> "The Committee reviewed the application submitted by Mrs. Pelly and Mrs. Shackleton to amend the zoning by-laws of the Town of Bridgetown, to add to the list of permitted uses in a residential zone "ladies boutique" and an adjustment to the parking regulations.
>
> Town Solicitor Cameron advised that no amendment is required to the Municipal Planning Strategy if the Committee were to recommend a change in the zoning by-law to the list of permitted uses. Town Solicitor Cameron further advised that possibly the Committee during the course of the plan review would like to consider the list of permitted uses in a residential

> zone with a view to either expanding or reducing this list to reflect the communities preference.
>
> The Committee discussed at length the various options with respect to the existing by-law and handling individual cases on the basis of development agreements.
>
> The Committee discussed at length the question of encouraging small business within the Town while at the same time the types of uses to be permitted in a residential zone.
>
> It was moved by K. Murphy and seconded by L. Ferguson that the Planning Advisory Committee recommend to the Town Council that the zoning by-law amendment requested by Mrs. Pelly and Mrs. Shackleton be turned down. There being three votes in favour of the motion and two opposed, Chairman Beviss declared the Motion Carried."

With this encouragement from the Planning Advisory Committee, the matter came before the Bridgetown Town Council on January 4, 1988.

> "Deputy Mayor Beviss referred to the minutes of a meeting of the Planning Advisory Committee held on December 22, 1987 during which time the application for rezoning submitted by V. Pelly and J. Shackleton, was reviewed in detail by the Committee. Deputy Mayor Beviss advised that the Planning Advisory Committee by a majority vote recommended to the Town Council that the zoning by-law amendment requested by Mrs. Pelly and Mrs. Shackleton be turned down.
>
> Councillor Freeman commented that she was and still is in favour of the application for rezoning being approved because she feels it is a necessary step to provide small business an opportunity to commence within the applicants home and grow to a point where it could locate in the downtown.
>
> Councillor Murphy advised that he certainly is in favour of encouraging small business but feels that it should be encouraged to locate in the downtown rather than a proliferation of small boutiques within the residential zone of the Town.
>
> Deputy Mayor Beviss advised that this was one of the most difficult questions for the Planning Advisory Committee to deal with as all members of the Planning

> Advisory Committee wish to encourage small business to locate and develop in the Town but the majority of the Committee feel that this would be best encouraged in the downtown rather than throughout the Residential Zone of the community.
>
> It was moved by Deputy Mayor Beviss and seconded by Councillor Murphy that the application submitted for an amendment to the Land Use By-law by V. Pelly and J. Shackleton be turned down. There being four (4) votes in favour of the motion and two (2) against, Mayor Walker declared the Motion Carried."

This motion is the decision now being appealed to the Board.

On January 7, 1988, Mr. Sturtevant sent Mrs. Pelly a letter advising her of the turndown and of her right to appeal to the Municipal Board within twenty-one days.

The Board is left with a difficult dilemma when the planning reasons of the planner are not set out in the documents and the minutes of the total discussion (which, as is quite common in council minutes and committee minutes, is not a transcript but merely a summary, quite often only of the result) required of the P.A.C. and Council. The Board is left perhaps to conjecture whether the decision of Council was made for appropriate reasons under the M.P.S. and whether all relevant matters required to be considered under the M.P.S. have been brought at least to the attention of the Council while, or before, it was making its decision.

The evidence that we have on this matter of Council's instructions in the planning considerations involved is from Mr. Sturtevant who says that he went through all the check-lists in the P.A.C. and to a lesser extent in the Council and made sure that the Councillors were well informed of the considerations before them.

With a great deal of hesitation because of the lack of detailed minutes and of any written Planner's Report, (in this particular application) the Board is prepared to accept this procedure although it thinks it is generally unsatisfactory. It should be well known to all planners that an appeal to a Board such as this may sometimes occur and that the Board must judge the decision of Council against the intent of the M.P.S. (It has been brought out quite clearly however in argument that appeals from the Town of Bridgetown to this Board on planning matters are almost non-existent.) The Board thinks that the better practice is for the planner to be careful to put on the documentary records both at the P.A.C. level and at the Council level his advice so that one can ascertain what has been put before those bodies. The basic duty of the Board in a planning appeal of this nature is to see if the refusal decision of the Council is reasonably within the intent of the M.P.S. Good documentary evidence of planning advice rendered by planners to Council assists the Board's reaching a correct decision.

One of the stated reasons, appearing from the Minutes, that this zoning not be granted is that this particular business would be better located in the downtown core. The Board accepts that it is a major objective of the M.P.S. of Bridgetown to start to ensure that businesses get into the downtown core. (Look at Schedule "A" of this particular decision to see the particular clauses of the M.P.S. and the Land Use By-law that the Board particularly perused before coming to this decision.)

It is clear, however, from the evidence given to the Board (and uncontradicted) that the proposed business will either be opened in the upstairs of the Appellant's house or it will not be opened at all. It is absolutely clear that if the business is successful and expands it can only stay in the small area permitted until it requires expansion (25% of any floor once in any building) and then to expand it will have to move to the downtown core when the business has passed through its incubation stage successfully. There is much to be said in a slow growth area such as the Town for allowing such incubation. Thus the Board does not accept the stated decision of Council that is within the intent of the M.P.S. that this business should be located in the downtown and can be encouraged to go there because that encouragement, from the facts of this particular case, are a total discouragement. Encouragement of appropriate growth on a low and unexciting scale is clearly within the intent of the M.P.S.

Then the question becomes (given the stated reasons on the Minutes) can the Board look at the other facts relating to the decision of Council and find out if the intent of Council reasonably follows the intent of the M.P.S.?

The Board, after having reviewed all the evidence and having looked at the site, believes the evidence of Mr. Sturtevant that all the "checklist" was gone into before Council and P.A.C. The Board believes the evidence of the Deputy Mayor Beviss that he considered all these "checklist" items either to discard them as irrelevant to the present application or to take them into consideration. The Board was impressed by Deputy Mayor Beviss when he said that many of the objections raised against the proposal were not appropriate reasons to reject the proposal.

The Board is satisfied that traffic considerations expressed as a consideration leading to rejection of the rezoning requested is not grounds for refusing to rezone this 280 sq. ft. retail proposal.

After hearing all the evidence the Board is satisfied that the real reason advanced by the planner to the Councillors and accepted by the Councillors at the Council meeting was that there was a grave concern that the proposal was a retail operation, that it was not site specific but would be general throughout the Town and would create pressure of a retail usage in a residential area above and beyond that which was contemplated by the M.P.S. This difficulty clearly arises when non-residential commercial uses are permitted in a residential zone -"home occupations" so-called. The Board believes that the Council decided in essence that this was the final straw (or the point of no return) and would not accept the addition of the retail use of a ladies boutique in a residential area.

Counsel for the Appellant argued under Policy 4.11.2 (page 16) that the following business uses shall be permitted in a designated residential area - "antique shops". She argued "antique shops" was a retail operation and that the ladies boutique was a retail operation and that therefore the Land Use By-law may be permitted as it was of "similar character and impact" to the antique shop. This is a fine point and can be argued both ways. The Board is not prepared to say, however, that the decision of Council excluding an addition of this type of retail use to the list under Policy 4.11.2 is not reasonably within the total intent of the plan. After some hesitation, the Board accepts the position of Council on this point.

There was not sufficient indication before the Town of the effect of a change in the parking requirements which would have been made if the rezoning had passed. Without the parking requirement change requested, the lot in question would not, even if the rezoning had been passed, be able to provide sufficient parking spaces on site as required.

The Board is clearly of the view that the parking requirements set out in the Land Use By-law itself would have to be altered to allow the particular proposal to succeed. There are no statistics or studies either before Council or before the Board that, to show the effect or non-effect on Town parking were the change in these parking requirements made as a prerequiste. The decision of Council, for this reason as well, was therefore reasonable and within the intent of the M.P.S. since Council had no proper information before it to consider changing Town parking.

The Board therefore has formed the opinion that the decision of Council complained of was reasonably made within the intent of the M.P.S. and the Board cannot allow the appeal.

Pursuant to Section 63(4)(a) the Board will confirm the decision of Council and dismiss the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 15th day of April, A.D., 1988.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

SCHEDULE "A"

EXCERPTS FROM MUNICIPAL PLANNING STRATEGY AND LAND-USE BY-LAW OF THE TOWN OF BRIDGETOWN

EXHIBIT P-6 & 7

(Approved by the Minister of Municipal Affairs September 22, 1982 incorporating the amendments made by the Minister at the time of approval and further amendments made up to February 28, 1987.)

[page 5]

INTRODUCTION

BACKGROUND

Planning has a long history in Bridgetown. As early as 1825, certain streets were granted to trustees for the benefit of the public, as a cosequence of the division of the Town into certain lots. The form thus imposed upon the Town is still evidence today in the area surrounding the intersection of Queen and Granville Streets, the core of the Town.

...the...Town...became an active founding member of the Annapolis County District Planning Commission. ...The Municipal Planning Strategy has grown out of an extensive and lengthy planning process.

The business of managing the use of land, the manner in which development occurs, and the provision of Town services which support urban growth, is complicated.

...
[page 4]

This Plan focuses on physical development within the Town to achieve orderly, economical, compatible and safe growth.

...

LOCATION

The Town of Bridgetown is situated in Annapolis County, Nova Scotia. It is located upon the fertile floor of the Annapolis River Valley, on the banks of the Annapolis River. The Town is approximately 180 km from Halifax and 156 km from Yarmouth. Within the County, Bridgetown is the centre town in a chain of urban centres in Annapolis County extending along Highway 1. Annapolis Royal to the west and Middleton to the east are each 24 km away, while Lawrencetown, a village, lies 11 km east of the Town. Bridgetown serves as an employment, administrative and service centre for this central portion of Annapolis County.

...

[page 5]

...consideration has been given throughout the planning process to the surrounding area and some attempt has been made to plan for Bridgetown in its context in the Annapolis County.

...In order to give the proper high priority to protecting, maintaining and encouraging the use of land capable of agricultural, production for primarily agriculture uses, clustered urban development in existing centres should be encouraged. ...Council has attempted to plan for the Town of Bridgetown, to enhance its function as a service centre for the surrounding parts of the County. ...to meet the variety of needs of the residents within the Town and its surrounding area.

Strategies...are not intended to place...to put the Town in a position where undesirable or uncontrollable development will occur.

...

[page 6]

PART I - DESCRIPTION AND INTERPRETATION

Maps - The Bridgetown Municipal Planning Strategy consists of the text and the following four maps:

a) Future Land-Use
b) Transportation and Town Services
c) Generalized Existing Land Use
d) Environmental Constraints

...The maps and the text must be considered together.

CATEGORY	**SYMBOL**
...	...
Residential	R
Downtown Commercial	DC

[page 7]

The Plan consists of:

(a) Statements of Context, which establish the basic reasons for and assist in the interpretation of the general goals:

(b) Goals, which are the ideals or ends to which a planned course of action is directed:

(c) Objectives, which are the means by which goals are achieved; and

(d) Specific Policy Statements, which are statements of intent by the Council. These will be followed to achieve the goals and implement the objectives.

As well, Council has adopted certain general goals (not listed in order of priority):

1.1 To encourage the development of Bridgetown as a service centre within the Annapolis County area.

1.2 To encourage managed, moderate growth...

1.3 To guide development so as to enhance Bridgetown's small town atmosphere and character.

1.4 To encourage the provisions of a range of employment opportunities.

1.5 To encourage...a diversified economic base.

...

1.8 To encourage development that is not financially detrimental to the Town.

...

1.10 To strengthen and encourage the tourist industry.

1.11 To strengthen and develop the downtown core area (centred on the existing downtown) so as to:

...

- encourage "one-stop shopping"

...

...

[page 9]

1.18 To ensure that all development and building is carried out properly and adequately...according to the adopted version...Land-Use By-law...

1.19 To ensure that land uses are properly allocated to reduce land use conflict and maximize convenience.

1.20 To minimize disruption to existing land uses.

...

Land Use By-law - The Land Use By-law is the mechanism by which Council intends to carry out and achieve the direct land use related aspects of this Plan....The Land Use By-law indicates what is permitted and is therefore more detailed and specific than the Plan.

[page 9]

In the preparation of the Land Use By-law, Council has been guided by the general policy that land should usually be zoned to reflect its existing use. Land which is not yet developed, but which is intended to be developed, according to the Plan, will normally have to be the subject of an amendment to the Land Use By-law. In considering an amendment, Council will ensure that the proposed use of the land is compatible with adjacent land uses, that the required services are provided or available and that the proposal is consistent with this Plan.

[page 10]

PART 2 - POPULATION

The population of the Town of Bridgetown has been stable since at least 1951, with population fluctuating in the area of 1,040. ...The Council can encourage population growth by co-operating with senior levels of Government to improve the economy of the area and by adopting policies that encourage development within the Town. ...

[page 11]

PART 3 - ENVIRONMENT AND CONSERVATION

There are approximately 358 ha (885 acres) in the Town of Bridgetown, of which 26% is currently developed for urban purposes. ...

[page 13]

PART 4 - RESIDENTIAL

The majority of the built environment in Bridgetown is used for residential purposes. ...It is a characteristic of the Town that virtually all residential uses are well maintained. ...All areas of the Town are...within relatively easy walking distance of the downtown, schools and recreational facilities.

At present, there are only a few incompatible land uses within the existing residential areas.

Council's goal is: to assist in the provision of a variety of living environments for the people of the Town which are compatible with the existing pattern of development.

...

4.1 It shall be the policy of Council to designate those areas shown on Map A, the Future Land Use Map, for residential development.

4.2.1 Designated residential areas shall be developed and maintained primarily for residential purposes and may include uses compatible with residential uses, including parks and playgrounds, secondary business uses (see Policy 4.11.2), tourist homes, boarding houses, rooming houses, funeral parlors and existing highway commercial uses (see Policy 4.13).

...

[page 14]

4.5.1 Designated residential areas shall be zoned as:

Residential Light Density	(R-1)
Residential Multiple Density	(R-2) or
Residential Rural	(R-3)

Council may establish other residential zones from time to time.

4.5.2 In considering the zoning of designated residential areas and in particular amendments to the Land Use By-law that would permit increased...non-residential uses in residential areas, Council shall ensure that the proposed use does not alter the predominant character of the area or the amenities of the area: does not have a deleterious effect on Town services; does not result in excessive noise or traffic; and does not have extended hours of activity.

4.6 It shall be the policy of Council to establish development and servicing standards for each residential zone, including standards respecting lot size, lot dimensions, yard clearance and servicing requirements, sufficient to maintain and enhance the integrity of residential areas within the Town.

[page 15]

...

A number of business uses are at present located within the designated residential areas, whether within a dwelling or in an accessory building on a lot. These uses create an interesting community, strengthen the economy and provide sources of income for Town residents. Council recognizes that these uses can be beneficial to the Town. However, care must be taken in regulating them so as to maintain the residential character of the properties and the neighbourhoods and also to avoid detracting from the commercial viability of the downtown area.

[page 16]

4.11.1 Business uses permitted in a designated residential area shall be secondary to a residential use; shall not alter the predominant character of the neighbourhood or its amenities; and shall not create noise and traffic to an extent inconsistent with the predominantly residential character of the area.

4.11.2 The following business uses shall be permitted in a designated residential area:

Antique shops
Furniture repair
Haridressing
Instruction in the arts and crafts
Professional offices
Repair of household items
Shoe repair
Tailoring
Toy repair

The Land Use By-law may permit these uses only within the dwelling on the lot or only within an accessory building on a lot or both. Council may, by an amendment to the Land Use By-law, add additional uses of similar character and impact to the foregoing list, subject to Policy 4.11.1.

...

4.11.4 Any such use shall be operated by the person residing in the dwelling on the lot and no more than two employees or assistants not residing in the dwelling on the lot may be employed.

...

4.11.6 Any such use shall be contained wholly within the dwelling or accessory building in which it is conducted.

4.11.7 The land Use By-law shall prescribe the total area that may be occupied by permitted uses within a dwelling on the lot and within an accessory building on the lot...

[page 17]

...

4.14.1 It shall be the policy of Council to permit existing residential uses in the downtown commercial area to continue, but Council shall not permit new residential development. ...

[page 19]

PART 5 - COMMERCIAL

Bridgetown is a service centre for the residents of the central portion of Annapolis County. It has a strong and relatively stable downtown commercial area....The Town and downtown busineses are actively engaged in a downtown improvement program.

...

Council's goal is: to assist in achieving an economically viable commercial base serving the needs of the residents of the Town and its surrounding area.

...

[page 20]

5.1.1 It shall be the policy of Council to designate the downtown commercial area as shown on Map A, the Future Land Use Map.

...

[page 21]

...

5.5 It shall be the policy of Council to encourage property owners in the business community to work together to determine ways to make the downtown a more convenient and safe place to visit, shop and work. To this end, a downtown design program shall be developed on the basis of professional advice and consultation with property owners, merchants and the public. Some items to be considered include parking and loading facilities, traffic congestion, encouragement of pedestrian traffic movement, improvement of general appearance and the possible undertaking of projects designed to attract pedestrian traffic.

[page 22]

...

5.6.2 ...Council recognizes that business uses in association with dwellings are a characteristic of the Town and these shall be permitted in accordance with Policy 4.11.1.

...

[page 23]

...

5.9 In any comprehensive development...Retail sales facilities similar to those permitted in the downtown commercial area may be permitted only as accessory uses and if the space occupied by any one of them does not exceed 14 M2 (150.7 sq. ft.).

...

[page 36]

PART 12 - TOWN SERVICES

Residents of Bridgetown are served with central water and sanitary sewer systems, storm drainage facilities (both artificial and natural) and public and private roads and sidewalks. Most of the urban development is serviced by central public systems. ...

...

[page 43]

PART 16 - PARKING FACILITIES

Adequate parking is one of the more significant problems facing Bridgetown...[and] is also necessary for many other parts of the Town, particularly those areas where the street rights-of-way are narrow. ...

16.1 Council shall continue to assist in the provision of parking facilities...by establishing parking requirements in the Land Use By-law for various types of development....

16.2 As indicated in Policy 5.4 and 7.5, Council may, through the Land Use By-law, exempt certain areas and uses from parking requirements.

...

[page 47]

PART 20 -FINANCES

...

20.2 It shall be the policy of council to assess development and servicing proposals on a comprehensive basis, including their impact on the finances of the Town.

[page 48]

PART 21 - IMPLEMENTATION

...

21.3 Council shall maintain a Planning Advisory Committee as the Committee primarily responsible for providing advice and assistance in implementing, reviewing, and where necessary, revising this Plan. Council and the Planning Advisory Committee shall encourage the active involvement of the people of the Town in planning for the Town.

Council cannot regulate directly from the Municipal Planning Strategy. The main means of implementing the Plan is by passing a Land Use By-law for the purpose of carrying out the intent of the Plan....

...

21.5 It shall be the policy of the Town to adopt such additional By-laws and modernize such existing By-laws as arenecessary to complement and assist in implementing the Plan.

...

[page 49]

21.7 The Land Use By-law adopted to carry out the intent of this Plan shall address matters relating to the use of land, buildings and structures. Provisions shall be included concerning:

(a) the use of land, buildings or structures including prohibited and permitted uses;

...

(d) building lines and size of yard, courts and other open spaces;

(e) parking and loading space requirements; and

(f) regulation of the nature, size, kind and description of signs.

21.8 When considering any amendment to a Land Use By-law, Council shall consider:

(a) whether the proposed amendment is permitted by the Plan;

(b) the necessity of the proposed use;

(c) the benefits and costs created by the proposed use with respect to the finances of the Town, employment and the general economy of the Town;

(d) the direction, pattern and sequence of development and servicing established by the proposal both within the immediate area and in the Town generally;

(e) alternative locations for the proposed use within the Town;

(f) the ability of the Town to provide services that would be required by the proposed development;

(g) the compatibility of the proposed use with adjacent land use and services and the alteration of the character of the area and Town;

[page 50]

(h) the impact on Town finances and administration;

(i) environmental disruptions created by the proposed use and any proposals for minimizing the impact on the environment;

(j) the effect of the proposed use on the projects identified in this Plan;

(k) the compatibility and impact of the proposed use on existing and proposed services;

(l) the compatibility of the proposed use on the existing and proposed road network, vehicular and pedestrian traffic, parking facilities and railways;

(m) the conformity of the proposal with the requirements set out in the Plan, the Land Use By-law, considerations for amendment of the Land Use By-law set elsewhere in this Plan, other requirements of the By-laws of the Town and Statutes and Regulations of the Provicial and Federal Government; and

(n) the report of the Planning Advisory Committee thereon.

21.9 It shall be the policy of Council to decline to consider an application for amendment to the Land Use By-law where the information required has not been provided by the applicant.

SCHEDULE "A" (continued)

EXCERPTS FROM TOWN OF BRIDGETOWN LAND USE BY-LAW

[page 5]

PART 2 - DEFINITIONS

In this By-law, ...

...

[page 6]

14. BUILDING means any structure,...

...

21. COUNCIL means the Town Council of the Town of Bridgetown.

...

[page 7]

...

27. DWELLING mens a building, occupied or capable of being occupied as a home, residence or sleeping place by one or more persons...

...

[page 8]

...

31. EXISTING means existing as of the effective date of this By-law.

...

[page 9]

...

44. LOT means any parcel of land described in a deed or as shown in a registered plan of subdivision.

...

[page 10]

...

47. MAIN BUILDING means a building in which the principal use of the lot occurs.

...

53. PARKING AREA means an area other than a street containing two or more parking spaces, which is available for the use of the public or provides as an accommodation for clients, customers, residents or employees.

[page 11]

54. PARKING SPACE means an area of not less than two hundred square feet, measuring ten feet by twenty feet, inclusive of driveways or aisles, for the temporary parking or storage of motor vehicles and which has adequate access to permit ingress and egress of a motor vehicle to and from a street by means of driveways, aisles or manoeuvering areas.

...

59. RETAIL STORE means a building or part thereof in which goods, wares, merchandise, substances, articles or things are offered or kept for sale directly to the public at retail value.

...

[page 12]

64. SIGN means any device which is visible from any public place and which directs attention to a product, service, place, activity, person, institution or business.

...

67. STRUCTURE means anything tht is erected, ...

...

[page 13]

...

74. TOWN means the Town of Bridgetown.

...

77. WAREHOUSE means a building where wares or goods are stored, but does not include a retail store.

...

80. ZONE means a designated area of land shown on the Zoning Map.

[page 14]

PART 3 - ZONES AND ZONING MAPS

1. ZONES

...

ZONES	SYMBOLS
Residential Light Density	R-1
Residential Multiple	R-2
...	
Downtown Commercial	C-1
Highway Commercial	C-2
...	

2. ZONING MAPS

The Zoning Map attached hereto forms part of this By-law.

3. ZONES NOT ON MAPS

The Zoning Map of this By-law may be amended, in conformity with the Municipal Planning Strategy, to utilize any zone in this By-law, regardless of whether or not the zone had previously appeared on the Zoning Map.

[page 15]

...

4. PERMITTED USES

A use that is not expressly permitted in a zone by this By-law is prohibited in that zone.

[page 16]

PART 5 - GENERAL PROVISIONS FOR ALL ZONES

1. SCOPE

(1) No building or structure shall hereafter be erected or altered or the use of any building changed, unless a development permit has been issued.

...

[page 23]

...

27. PARKING REQUIREMENTS

(1) Off-street parking located on the same lot as the use and having unobstructed access to a public street, shall be provided and maintained for every building or structure to be erected or enlarged in conformity with the following schedule:

Type of Use	Parking Required
...	
[page 24]	
...	
(i) Business uses in an R-1, R-2 or R-3 zone:	
(a) within a dwelling	One parking space for every 20 m2 (215.2 sq. ft.) of floor space used in the business.
...	
(n) A dwelling containing not more than two dwelling units	One parking space for each dwelling unit
...	
[page 25]	
(p) All other dwelling units	One and one-half parking spaces for each dwelling units.
...	

(3) Where the calculation of the number of parking spaces required pursuant to Subsection (1) results in a fraction, the number of parking spaces required shall be the next larger whole number.

(4) Wherethere is more than one use on a lot, the parking requirements for each use may be totalled before, applying Subsection (3) to determine the total number of parking spaces required on that lot.

...

[page 28]

PART 6 - SIGNS

...

[page 30]

...

6. SIGNS IN A RESIDENTIAL ZONE

(1) Subject to Subsection (2) and (3),...shall not be employed for commercial advertising and in the ...

[page 31]

(2) In the case of a business use permitted in an R-1, R-2 and R-3 zone...is permitted for each such use.

...

[page 35]

PART 7 - GENERAL REQUIREMENTS FOR ALL RESIDENTIAL ZONES

...

3. BUSINESS USES PERMITTED IN RESIDENTIAL ZONES

(1) Subject to the other Subsections of this Section, nothing in this By-law shall prevent the use of a dwelling or accessory building in an R-1, R-2 or R-3 zone for the following uses:

Uses Permitted Within the Dwelling

Antique shops
Furniture repair
Hairdressing
Instruction in the arts & crafts
Professional offices
Repair of household items
Shoe repair
Tailoring
Toy repair
"Sale of arts and crafts supplies where instruction is offered"

(2) No more than two of the uses listed in Subsection (1) are

permitted on a lot.

[page 36]

...

(11) For uses listed in Subsection (1) that take place within a dwelling, the total area occupied by permitted uses shall not exceed twenty-five percent of the total floor area of the dwelling and shall not exceed twenty-five percent of the total ground floor area of the dwelling.

...

[page 62]

3. APPLICATION FOR AMENDMENT OF LAND USE BY-LAW

An application for an amendment to the Land Use By-law shall be accompanied by a statement of the purpose of the amendment, plan of the area the zoning of which is proposed to be changed, showing any buildings located on the land, vehicular or rail access availability or to be provided, water and sewerage facilities available or to be provided.

...

ERFANI v. COUNTY OF HALIFAX

PLANNING - L.U.B. AMENDMENT - REFUSAL TO REZONE FROM R-2 TO C-1 - WORST CASE SCENARIO - SACKVILLE M.P.S., POLICIES P-34, P-63.

This is an appeal by M.E. from a decision of Halifax County Council refusing to amend the L.U.B. to permit a video and audio equipment repair service to be operated in the basement of his home in Sackville. Council's refusal appeared to be based in part on an assumption that Appellant was already operating the business. The Board found that he was not operating the business. Council emphasized worst case scenario.

HELD: Appeal allowed. Council instructed to rezone the lot from R-2 to C-1.

While possible future uses of a property may be taken into account to some limited extent, it cannot be the sole or major consideration. The words "may consider permitting" means that Council has a discretion. Even though a proposal meets all the criteria in the M.P.S. it may be reasonable for Council to refuse the application. Council's discretion, however, must be exercised properly and a refusal must be reasonably consistent with the intent of the M.P.S. Here Council proceeded on the basis of incorrect facts and placed undue emphasis on the worst case scenario.

NSMB-598-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, being Chapter 9, of the Statutes of Nova Scotia, 1983, as amended;

- and -

IN THE MATTER OF: An Appeal by **MEHRDAD ERFANI** from a decision of the Council of the Municipality of the County of Halifax made the 28th day of September, 1987, which refused to amend the Land-Use By-law by rezoning 190 Cobequid Road in Sackville from R-2 (Two-Unit Dwelling) Zone to C-1 (Local Business) Zone.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: MEHRDAD ERFANI, the Appellant, on his own behalf;

DANIEL WEIR, LL.B., on behalf of the Municipality of the County of Halifax.

DECISION

A hearing was held by the Board on April 12, 1988, on an appeal by **MEHRDAD ERFANI** from a decision of the Council of the Municipality of the County of Halifax (hereinafter referred to as the "Municipality") made September 28, 1987, which refused to amend the Land-Use By-law by rezoning 190 Cobequid Road, Sackville from R-2 (Two-Unit Dwelling) Zone to C-1 (Local Business) Zone.

There was a previous hearing on February 25, 1988 at which time an adjournment was granted due to the fact that the

Appellant was in hospital. At that hearing the Board heard evidence from the Appellant's mother that she had served the Notice of Hearing to the various homes in the neighbourhood.

The Board is satisfied that it has jurisdiction to hear the appeal.

The Appellant owns and lives in a bungalow at 190 Cobequid Road in Sackville. He is employed part-time by the Navy. He is a Canadian citizen who recently brought his parents from Iran. He wishes to establish a video and audio equipment repair service in the basement of his house with the intention of having his parents work in the business. He has experience in the field of television repair.

The subject property is zoned R-2 (Two-Unit Dwelling) Zone. This zone permits a business use of up to 300 square feet in a dwelling. There is a limit on the number and size of any signs for the business use.

The Appellant applied in May 1984 for a rezoning to C-2 (General Business) Zone. He was advised by letter that he could not apply for a C-2 Zone but could make application for a C-1 (Local Business) Zone. The Appellant met with Joan MacKinnon, Senior Planner with the Policy Division of the Municipality. She reviewed his options of either conducting his business under the R-2 Zone or applying for a C-1 Zone.

The Board was unable to learn the exact dimensions of the space in which the business is to be run. The total basement area is, according to the Staff Report contained in

Exhibit E-1, 1000 square feet. Some of this area cannot be used for the business but it appears that the area which the Appellant intends to use will exceed the 300 square foot maximum permitted in the R-2 Zone. The Appellant expressed concern that under the R-2 Zone he would not be permitted to place a sign on his garage. There is no restriction in the Land-Use By-law (hereinafter referred to as the "L.U.B.") which prohibits a sign being placed on a garage, but only one sign is permitted in the R-2 Zone.

The Staff Report prepared for the Planning Advisory Committee (hereinafter referred to as "P.A.C.") recommended approval of the rezoning. On August 24, 1987, the P.A.C. recommended approval of the application.

At the Public Hearing on September 28, 1987, Ms. MacKinnon reviewed the application and the staff recommendation for approval. According to the Minutes of the Public Hearing contained in Exhibit E-1, Councillor DeRoche asked whether the application was "coming forward possibly to legitimize a business that is already in business". The Minutes reflect and Ms. MacKinnon in her testimony stated that to the best of her knowledge she had advised the Councillors that the Appellant was operating the business at the time of the application in accordance with the restrictions in an R-2 Zone.

The Appellant testified and the Board accepts as a fact that he has not operated the business and that he has been awaiting the approval of his application before commencing the business.

Councillor MacKay, the Councillor for the District, advised Council that he was not in favour of the application since it would permit other uses once rezoned and that residents in that area had expressed opposition to commercial development when the Municipal Planning Strategy (hereinafter referred to as the "M.P.S.") was being drafted.

There were no presentations by the public either in favour or in opposition to the application at the Public Hearing. The evidence suggests that no one objects to the use of a part of the Appellant's home as a video and audio repair business.

The Appellant was advised by letter dated September 29, 1987, that his application was refused. There is no reference in that letter to his being able to carry on a business in the R-2 Zone.

The subject property is located on the corner of Cobequid Road and Malik Court. The house fronts on the west side of Cobequid Road and has been there for a number of years. The houses on Malik Court are all duplexes and have been built recently. There is a Green Gables store on the corner of Cobequid Road and Glendale Drive. There is one house between Malik Court and the Green Gables store. Across the street from the subject property on the east side of Cobequid Road is a ball field which is part of the property on which the Halifax Correctional Centre is located. Adjacent to the ball field is the Sackville Industrial Park. To the south of the property on Cobequid Road is a single family home.

The subject property has been designated on the Generalized Future Land-Use Map as Urban Residential. Policy P-34 permits rezonings within the Urban Residential designation for local commercial uses. The Policy reads as follows:

> "P-34 Notwithstanding Policy P-30, within the Urban and Rural Residential Designations, Council may consider permitting commercial uses which provide a service to the local neighbourhood, by amendment to the zoning by-law. In considering such amendments Council shall have regard to the provisions of Policy P-63 and Policy P-104."

Policy P-63 provides as follows:

> "P-63 In support of neighbourhood commercial uses and with reference to Policy P-34, Council may consider permitting local commercial uses within the Urban and Rural Residential Designations by amendment to the zoning by-law. In considering such amendments Council shall require that:
>
> i) the use is primarily intended to serve the local neighbourhood;
>
> ii) the scale and external appearance of the use is in keeping with that of surrounding uses;
>
> iii) the parking areas are graded; and
>
> iv) the use is contained within a building."

Policy P-104 sets out the matters which must be given appropriate regard on any application to amend the Land-Use By-law and provides as follows:

> "P-104 In considering amendments to the zoning by-law or development agreements, in addition to all other criteria as set out in various policies of this Plan, Council shall have appropriate regard to the following matters:
>
> (i) that the proposal is in conformity with the intent of this Plan and with the requirements of all other municipal by-laws and regulations;
>
> (ii) that the proposal is not premature or

inappropriate by reason of:

a) the financial capability of the Municipality to absorb any costs relating to the development;

b) the adequacy of sewer and water services;

c) the adequacy or proximity of school, recreation and other community facilities;

d) the adequacy of road networks leading or adjacent to, or within the development; and

e) the potential for damage to or for destruction of designated historic buildings and sites.

(iii) that controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of:

a) type of use;

b) height, bulk and lot coverage of any proposed building;

c) traffic generation, access to and egress from the site, and parking;

d) open storage;

e) signs; and

f) any other relevant matter of planning concern.

(iv) that the proposed site is suitable in terms of steepness of grades, soil and geological conditions, locations of watercourses, potable water supplies, marshes or bogs and susceptibility to flooding."

The Staff Report does not specifically address each of the criteria listed in Policy P-63 or in Policy P-104 but the Report does state that the proposal meets the criteria in the M.P.S. The Report emphasizes that the proposed business is of a local commercial nature and will serve the needs of persons in the neighbourhood.

The Minutes of the Public Hearing and Council's discussion do not cite any violations of Policies P-63 or P-104.

Mr. Stephen Moir testified on behalf of the Municipality and was qualified as an expert in planning matters. He looked at the site on several occasions and had reviewed the relevant policies of the M.P.S. While he could not point to a specific criteria in Policy P-63 which would be violated by the proposed rezoning he expressed concern that the Staff Report had not fully discussed the implications of the proposal. He felt that the fact that once the property was rezoned its use could change and thereby be a "major intrusion" in the neighbourhood, was a relevant consideration which should have been included in the Staff Report. He referred to paragraph (iii)(f) of Policy P-104 which requires that there be controls "to reduce conflict with any adjacent or nearby land uses by reason of...any other relevant matter of planning concern". The fact that the rezoning would permit a convenience store was a relevant matter in his opinion.

Mr. Moir also raised concern whether the side yard requirements of a C-1 Zone as set out in the L.U.B. had been met. He had not taken any measurements. Councillor MacKay testified that this was not a concern at the public hearing stage but would be addressed when a development permit was applied for. The Board notes that Policy P-104 requires that the proposal be in conformity with the requirements of all municipal by-laws. The Staff Report states that the proposal was in conformity with the M.P.S. The author of the Staff Report was not available and Ms.

MacKinnon could not advise the Board whether the L.U.B. requirements had been met. The Appellant stated that the side yards met the requirements.

On an appeal under Section 63 of the Planning Act the Board may not allow the appeal unless it finds that "the decision of council cannot reasonably be said to carry out the intent of the municipal planning strategy".

The Minutes of Council's decision indicate that Council focused on three issues:

1. Whether the application was to legitimize an existing business;
2. Whether the business could be operated within an R-2 zone;
3. The future effect of the zoning - worst case scenario.

Both the Minutes and the oral testimony indicate that Council believed that the business was already operating and that it could be operated in an R-2 Zone. In fact the Appellant has not operated the business. The area which the Appellant proposes to use for the business apparently exceeds the maximum permitted in an R-2 Zone.

With respect to the future effect of the rezoning or what is sometimes referred to as the "worst case scenario", Council asked for and was given a list of the permitted uses in a C-1 zone. It was specifically noted by Councillor MacKay during council's discussion that the rezoning would allow other uses like "food stores". An examination of the relevant policies of the M.P.S. indicates that Council is to consider the application in light of its proposed use. Policy P-63 refers to "the use" and Policy P-104 refers to "the proposal" and the "proposed development". While the Board agrees that future uses of the property may be taken into account to some limited extent, it cannot in the Board's opinion be the sole or major consideration. The M.P.S. permits rezonings to C-1 within the Urban Residential designation. The fact that the C-1 Zone has a number of different permitted uses should not be the determining factor when a person seeks a rezoning for a use which is acceptable to the neighbourhood. Where Council wishes to limit future development on a particular site, Council should consider amending the M.P.S. to provide for more restrictive zones and/or to provide for development agreements.

Councillor MacKay in his evidence and Mr. Weir in argument emphasized that the wording in both Policy P-34 and P-63 is that "Council may consider permitting" commercial uses within the Urban Residential designations (underlining added). The Board agrees that Council does have a discretion and that even though a proposal meets all the criteria in the M.P.S. it may be reasonable for Council to refuse the application. Council's discretion, however, must be exercised properly and the decision to refuse must be reasonably consistent with the intent of the M.P.S.

The Board is not satisfied that Council's decision is reasonably consistent with the intent of the M.P.S. in this case given that Council has proceeded on the basis of incorrect facts (i.e. that the Appellant has been operating a business in the existing zone) and has placed undue emphasis on the worst case scenario.

The Board allows the appeal and instructs Council to amend the Land-Use By-law by rezoning 190 Cobequid Road in Sackville from R-2 (Two-Unit Dwelling) Zone to C-1 (Local Business) Zone.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 25th day of April, A.D., 1988.

Linda D. Garber
LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

BUSCHE AND ROSE v. TOWN OF MAHONE BAY and HATCHER

PLANNING - L.U.B. AMENDMENT - APPROVAL OF REZONING FROM R-1 TO C - FACTORS TO BE CONSIDERED - PLANNING ACT S.S. 18(1)(c), 45, 63(4)(c) - TOWN OF MAHONE BAY M.P.S. POLICIES 4, 7, 5.5, 7.1, 7.5, 14.3.

This is an appeal by R.H.B. and S.L.R. as aggrieved persons from a decision of the Council of the Town of Mahone Bay rezoning lands on Fairmont Street from Residential Single and Two Family (R-1) Zone to Commercial General (C) Zone to permit the operation of an art gallery and the sale of art supplies and frames. The Appellants own homes near the subject property. The L.U.B. permits an art gallery in a residential zone but not the sale of art sale supplies.

HELD: The Board allowed the appeal and instructed Council to amend the L.U.B. to permit the sale of art supplies and frames in conjunction with the retail sale of products made on the premises.

The District Planning Commission may include recommendations in its report to Council provided that the report has fully outlined the requirements of the M.P.S. It is necessary to note any major requirements of the L.U.B. and determine that they are capable of being complied with. The Report should indicate whether any criteria in the Implementation Policy is applicable and what the effect is. Here the M.P.S. and L.U.B. require on-site parking and this was not considered. The issue of traffic congestion requires more than a viewing of the site. While the fact that a property has been designated Commercial on the F.L.U.M. is a factor, it does not mean that the property should automatically be granted a rezoning to Commercial. Council may consider factors in addition to those cited in the M.P.S. so long as undue emphasis is not placed on irrelevant considerations. The fact that there is existing commercial space is a consideration which Council might consider. Council should where possible avoid a needless rezoning to Commercial in an existing residential zone.

NSMB-7-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, being Chapter 9, of the Statutes of Nova Scotia, 1983, as amended;

- and -

IN THE MATTER OF: An Appeal by **ROY H. BUSCHE and STANLEY L. ROSE** from a decision of the Council of the Town of Mahone Bay made February 9, 1988, which decision approved an amendment to the Town's Land Use By-law by rezoning 18 Fairmont Street, Mahone Bay, from Residential Single and Two-Family (R-1) Zone to Commercial General (C) Zone on the application of **MICHAEL HATCHER.**

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: ROY H. BUSCHE and STANLEY L. ROSE on their own behalf;

SAM LAMEY, LL.B., and MICHAEL BAKER, LL.B., on behalf of the Town of Mahone Bay.

DECISION

This appeal is from a decision of the Council of the Town of Mahone Bay ("Town") which resulted in the rezoning of 18 Fairmont Street from Residential Single and Two-Family (R-1) Zone to Commercial General (C) Zone to permit the owner, **MICHAEL HATCHER**, to open an art gallery and sell his own paintings and art supplies and frames in part of his home.

The Appellants, **ROY BUSCHE and STANLEY ROSE** testified with respect to the service of the Notice of Hearing. The Board is satisfied that there was proper service and that the Appellants are aggrieved persons within the meaning of Section 63(1A) of the Planning Act.

The Appellants both own homes near to the property which is the subject of the rezoning. Mr. Rose lives on the opposite side of Fairmont Street directly across from the back end of the subject property. Mr. Busche lives at the intersection of Fairmont and Pleasant Streets. Four houses lie between his home and the subject property.

The subject property has been owned by Mr. Hatcher's family for 30 years. The house will accommodate two families. Until the fall of 1987 Mr. Hatcher's grandmother had resided in one half of the house and he and his family in the other. In November, 1987, he approached the Town with a request to turn a portion of the house into a 400 square foot art gallery where he intended to sell his own paintings. In order to assist the financial viability of this venture he wishes to sell art supplies as well. Initially, he was seeking approval to operate within the existing residential zone. Part 7 of the Land Use By-law ("L.U.B.") permits certain business uses including the retail sale of products made on the premises, in residential zones where the proprietor of the business is resident in the main residence on the lot. Mr. Hatcher met all the requirements of the section except that he intended to sell art supplies and frames in addition to his paintings. That option not being available he applied on December 10, 1987 to the Town for a rezoning to Commercial General (C) Zone.

Town Council dealt with his request on December 15 and referred it to the District Planning Commission for study and a report back to Council. Geoffrey MacDonald, a Planner with the Commission, handles requests from the Town. He prepared a brief report which was dated December 18, 1987. He recommended that Council grant the rezoning. Mr. MacDonald appeared at the January 12, 1988, Council meeting and summarized his report. The Minutes note as well that he "stated that the rezoning was in conformity with the appropriate sections of the Municipal Planning Strategy and that Council should amend the Land Use By-law".

Council decided to give notice of intention to amend the L.U.B. A public hearing was scheduled for February 9, 1988. Both Appellants attended the Public Hearing and made presentations in opposition to the proposed rezoning. Town Council later on the same day, after some discussion, approved the motion to amend the zoning from Residential Single and Two-Family (R-1) Zone to Commercial General (C) Zone.

At the Board hearing both Appellants testified and they reviewed the grounds of appeal. Mr. Kyle Hiltz, Town Clerk, Geoffrey MacDonald, Planner and the Applicant, Michael Hatcher, testified on behalf of the Town. Mr. Charles Davis, a resident in the area of the subject property, and Mr. Jack Sorenson, the owner of Zwicker's Inn, a popular restaurant located near the subject property, both made presentations. The Board also received four letters from residents of the Town who are opposed to the rezoning.

One of the Appellant's grounds of appeal dealt with the meaning of the words "advise and assist the Council" as they are used in Section 18 of the Planning Act. This Section sets out the duties of a district planning commission. It was the Appellant's contention that the words "advise and assist" did not permit the Planner to make a specific recommendation to Council. At the hearing, the Board stated that in its opinion the giving of advice included making a recommendation. "Advise" is defined in Black's Law Dictionary, 5th ed., as:

> "To give an opinion or counsel, or recommend a plan or course of action, ...Advise imports that it is discretionary or optional with the person addressed whether he will act on such advice or not."

The Oxford Dictionary of Current English, c. 1984, defines "advise" as:

> "give advice (to), recommend, inform".

Section 18(1)(c) provides that a commission shall:

> "(c) advise and assist the council of any participating municipality in the preparation, amendment or revision of a planning strategy, land use by-law or subdivision by-law."

Given the definition of "advise" cited above, this section permits the staff of the Commission to make a recommendation with respect to a proposal to amend the L.U.B. The Board notes, however, that a recommendation should only be made when the report has fully outlined the requirements of the Municipal

Planning Strategy (hereinafter referred to as the "M.P.S.").

In this case the Planner's Report is brief but did have a copy of what he considered the relevant sections of the M.P.S. and the L.U.B. attached as appendices. Mr. MacDonald testified that due to the fact that he was going on vacation the report was prepared quickly and was shorter than normal. He further testified that he felt that it did provide sufficient information to Council. In the Board's opinion the report is deficient in that it does not discuss the relevant policies of the M.P.S. in any detail. It appears to the Board that the emphasis was placed on the fact that the subject property was within the area designated commercial in the Future Land Use Map and that it abuts the Commercial General (C) Zone. From the evidence it appears that Council relied on these facts and a desire to allow Mr. Hatcher to operate the business.

Before discussing the policies in the M.P.S. it is important to note one relevant factor that was not discussed in the Planner's Report but which was included in Mr. Hatcher's original letter of application. A business known as Mahone Video was being operated on Fairmont Street in a residential home. It was located 2 houses up from the subject property. According to the evidence, particularly that of Charles Davis, patrons of this business parked on both sides of Fairmont Street, which is a very narrow street (according to the Appellants it is 18 feet wide), and from time to time blocked off the street so that a person travelling from Pleasant Street to Main Street would not be able to get through. The business is no longer operating as the house is being sold but was operating at all relevant times when the application was before Council.

Mahone Video was located in an area zoned residential and designated as Residential on the Future Land Use Map. In response to a question from the Board, the Town Solicitor indicated that this use in a residential zone was permitted by Section 7.1 of the L.U.B. which provides as follows:

> "Nothing in this By-law shall prevent the use of a dwelling or accessory building in a Residential (R1 or R2) Zone or in a Rural (Ru) zone for business purposes provided that:
>
> a) the proprietor of the business shall be resident in the main residential building on the lot;
>
> b) the business shall fall within one of the following types of uses:
>
> i) Business and Professional Offices;
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> ii) Craft Shops and Custom Workshops;
>
> iii) Studios for the practice or instruction of fine arts, commercial arts or crafts;
>
> iv) Catering Establishments;
>
> v) Taxicab operations;
>
> vi) Personal Service Shops;
>
> vii) Repair Shops
>
> c) the gross floor area devoted to the business use shall not exceed four hundred (400) square feet;
>
> d) retail sales of products shall be limited to the sale of products made on the premises;
>
> e) one off-street parking space, other than that required for the dwelling, is provided for every two hundred (200) square feet of gross floor area occupied by the business or professional use;

f) there shall not be more than one (1) sign on the lot related to the business use. The sign shall be non-illuminated and shall be either a projecting wall sign or a flat fixed wall sign except that a ground sign may be permitted where the building in which the business is located is set back from the street furtherthan the applicable minimum setback requirement. In this latter case, a ground sign shall conform to the applicable minimum setback requirement as if it were a building. The maximum area of a sign shall be three (3) square feet;

g) no mechanical equipment is used which would be obnoxious;

h) no open storage or outdoor display shall be permitted.

i) all operations are carried out within the main or accessory building; and

j) no more than two (2) commercial motor vehicles related to the business use shall be kept on or operated from the lot on which the business is located.

It is difficult to determine on what basis a video store would come within this section. The section would, however, permit an art gallery where the artist was selling his own works. The problem in this case is that Mr. Hatcher wants to sell art supplies as well. This is a reasonable request. One assumes that persons who operate studios for the "instruction of fine arts, commercial arts or crafts" pursuant to clause (iii) are in all likelihood selling supplies not only to their students but to the general public. An amendment to the by-law to permit the sale of supplies used in the production of the particular fine art or craft would have been an option for council to consider. This option was not brought forward.

The Board notes that both Appellants indicated that they would not object to Mr. Hatcher operating an art gallery within the Residential Zone but were opposed to the rezoning to Commercial.

A full examination of the policies in the M.P.S. is required in order to determine whether or not Council's decision was reasonably consistent with the intent of the M.P.S. The Appellants stressed that the emphasis in the M.P.S. was the maintaining and enhancing of the quality of life in the Town. While this is a focus of the M.P.S. it is also true to say that the M.P.S. recognizes the need to encourage "new development related to the tourist industry". It is further noted at Policy 2.0 of the M.P.S. that the emphasis is to be placed on "tourism, particularly fine arts and crafts". Policy 4.7 states:

> "It shall be the intention of Town Council to encourage development that is compatible with the Town's role as a scenic residential community orientated toward tourist activity."

The policies under the section headed RESIDENTIAL DEVELOPMENT AND LAND USE place an emphasis on maintaining the residential character in those parts of the Town which are in areas designated for residential use as shown on the Future Land Use Map. Policy 5.5 indicates that existing residential areas were to be designated for residential use:

> "5.5 Portions of the Town that are presently predominantly residential or that have potential for residential development shall be designated for residential use, and non-residential or business uses in these areas shall be prohibited except as provided for in Policies 7.2, 7.4 and 7.5 of this Planning Strategy.

Policy 7.1 establishes the central commercial district which is located along a portion of Main Street and Edgewater Drive. Neither the Planner nor the Town Clerk were involved in the formulation of the Future Land Use Map and were unable to advise the Board as to how the line was drawn. While most of the properties within the commercial designation on the Future Land Use Map front on either Main Street or Edgewater Drive, it appears to the Board that the boundary of the Commercial designation has been drawn to include the property immediately behind any property which fronts on the south side of Main Street and the west side of Edgewater Drive within the Commercial district.

Policy 7.5 specifically provides for business uses in areas that are zoned residential:

> "7.5 Business uses that are incidental or secondary to a main residential use shall be permitted in single family residences and residential accessory buildings in the area zoned for 1 and 2 family residential use...subject to the limitations on type of use, floor area, signage, and parking contained in the Land Use By-law."

Policy 7.3 requires business uses to provide off-street parking for customers so as to minimize congestion. The L.U.B. sets out the requirements as to the number of parking spaces required.

Implementation Policy 14.3 sets out the requirements for amending the L.U.B. and provides as follows:

> "When considering amendments to the Land Use By-law, and in considering Development Agreements in addition to all other criteria as set out in the various policies of this Planning Strategy, Town Council shall consider the following:

a) the proposal conforms to the intent of the Planning Strategy and to other applicable Town by-laws and regulations;

b) that the proposal is not premature or inappropriate due to:

i) financial ability of the Town to absorb costs related to the development;

ii) adequacy of Town sewer and water services, including fire flows and water pressure or the adequacy of physical site conditions for on-site services;

iii) creation or worsening of a pollution problem in the area such as but not limited to soil erosion and siltation of watercourses;

iv) adequacy of storm drainage and effects of alteration to drainage pattern;

v) adequacy and proximity of school, recreation and other community facilities;

vi) adequacy of street networks regarding congestion and traffic hazards;

c) suitability of site regarding grades, soils and geological conditions, location of watercourses, marshes, bogs, and swamps, and proximity to railway and utility rights-of-way."

With respect to paragraph (a) of Policy 14.3 the proposal did not indicate that on site parking was planned nor where it was to be located as required by Policy 7.3. Mr. MacDonald visited the site and testified that he felt that there was space for parking. There are restrictions in Section 11.1 of the L.U.B. respecting parking and side-yards where a Commercial Zone abuts a Residential Zone. There is no evidence that this was considered. The Board recognizes that at the initial stages it is not always possible to determine that every aspect of the L.U.B. has been complied with, as will be required before a development permit is issued. It is necessary in the Board's opinion, however, to note any major requirements of the L.U.B. and determine that they are capable of being complied with when as here the Implementation Policy states that the "proposal conforms...to other applicable Town By-laws and regulations".

With respect to paragraph (b) of Policy 14.3 it is not satisfactory in the Board's opinion to merely state that the "proposal is not premature or inappropriate for any of the reasons cited in Policy 14.3(b)". The Report should give a brief note on each of the factors indicating whether or not it is applicable and what the effect is. Where, as in this case, the proposal will not involve construction or an increase in the number of persons residing on the subject property it may be that some of the clauses are not applicable but this should be stated.

The one crucial factor is clause (vi) dealing with the adequacy of street networks regarding congestion and traffic regards. Mr. MacDonald says he drove to the site and examined it. He recognized that the street was narrow but in his testimony suggested it was no worse than others. He expressed the view that the problem was one which he could not control in that the Town Council was not prepared to place restrictions on parking. Council requested Mr. MacDonald to conduct a study and report back. The issue of traffic congestion is one that requires more than a viewing of the site. A request to the Traffic Authority, in this case, the Chief of Police, is a procedure followed by some planners. The proposed amendment is to rezone a residential property to commercial. While the Board has noted on other occasions that Council should not place undue emphasis on the worst case scenerio, it is a factor that should be considered when there is an existing problem with respect to one of the criteria. Parking was a problem on Fairmont Street due in part to the existence of Mahone Video. The narrow street and the fact that illegal parking on Main Street at the intersection with Fairmont Street makes it difficult to safely turn onto Main Street are all matters which should have been mentioned in considering Policy 14.3(b)(vi). At the time of the application Fairmont Street was inadequate with respect to congestion and traffic hazards which would make the rezoning to commercial inappropriate. There was some discussion of the traffic problems at the Public Hearing.

Included in the grounds of appeal was the suggestion that before a property could be rezoned to commercial, the applicant must establish that he has a commercial operation and is not merely promoting a hobby. The Board finds that there is no such requirement and further that the evidence indicates that Mr. Hatcher is starting a business not just furthering a hobby.

Another ground of appeal relates to Section 45 of the Planning Act. The Appellants argued that the fact that the subject property was designated as Commercial on the Future Land Use Map did not mean that Council must rezone it. They suggested that Council believed that if something was permitted under the M.P.S. and was applied for, it must be granted. From the comments of counsel it appears that this may well be the view of Town Council. The Planner definitely placed an emphasis on the fact that the subject property was so designated. While the fact that a property is in an area that has been designated commercial on the Future Land Use Map is a factor, it does not mean that the property should automatically be zoned commercial.

The Appellants also argued that Council should have taken into account the number of available spaces that were already zoned commercial. The Planner testified that there was no policy in the M.P.S. that would permit Council to consider this. Council is not restricted from considering additional factors. The M.P.S. mandates that certain factors must be considered but in exercising its discretion, Council is permitted to consider other matters, so long as undue emphasis is not placed on irrelevant considerations. It is clear from the M.P.S. and the Future Land Use Map that the preferred location for commercial ventures is Main Street and Edgewater Drive. Policy 7.5 of the M.P.S. and Section 7.1 of the L.U.B. provide for business uses in the residential part of Town. The fact that there is existing commercial space is a consideration which Council might well have considered in this case.

The M.P.S. calls for the reduction of conflicts between incompatible uses. Council should where possible avoid a needless rezoning to a Commercial Zone in an existing residential area. In this case Council should have considered an amendment to Section 7.1 of the L.U.B. to permit the sale of art supplies.

Mr. Hatcher applied for the rezoning because he could not operate under Section 7.1 of the L.U.B.

For the various reasons cited above the Board is of the opinion that Council's decision is not reasonably consistent with the M.P.S. The Board is prepared to allow the appeal. Section 63(4)(c) of the Planning Act gives the Board the power to allow an appeal by instructing council to amend the Land-Use By-law. In the Board's decision in Oakdene Estates Ltd. v. County of Halifax (1985) 4 M.B.D 1, it was stated that the Board could use this section to create a special zone but for various reasons it declined to do so in that case.. In this case, it seems appropriate that the Board instruct Council to amend Section 7.1(d) of the L.U.B. to permit the sale of art supplies and frames in conjunction with the retail sale of products made on the premises.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 8th day of June, A.D., 1988.

Linda D. Garber

LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

FLORENCE DEVELOPMENT LTD. v. COUNTY OF HALIFAX

PLANNING - L.U.B. AMENDMENT - REFUSAL TO REZONE 14 LOTS FROM R-1 TO R-2 - INTERESTED PERSON - MUNICIPAL BOARD ACT, s.s. 27(3)(4).

This is an appeal by F.D. Ltd. from a decision of Halifax County Council refusing to amend the L.U.B. by rezoning 14 lots in Sackville from R-1 to R-2 (Two Dwelling Unit) Zone. The Board had earlier considered two rezoning applications for the same area. See Oakdene Estates Ltd. v. Co. of Halifax (1985), 4-B, M.B.D. 1, Oakdene Estates Ltd. v. Co. of Halifax (1986), 5-B, M.B.D. 571. Portion of the land subsequently sold to current Appellant. The Board determined one resident to be an "Interested Person" pursuant to Section 27(4) of the Municipal Board Act.

HELD: Appeal allowed. County Council instructed to amend L.U.B. to rezone land to R-2.

Council was ill-advised by staff as to the appropriate policies and the intent of the M.P.S. Planning staff gave too much weight to objections of residents. Residents objecting to R-2 zoning and to fact that trees will be cut down which act as a buffer. Board felt that trees would be cut down even if developed as R-1 so discounted this objection. Grades on property provide some buffering.

NSMB-603-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: **The PLANNING ACT**, being Chapter 9 of the Statutes of Nova Scotia,1983, as amended;

- and -

IN THE MATTER OF: An appeal by **FLORENCE DEVELOPMENT LIMITED**, a body corporate, Appellant, from a decision of the **COUNCIL OF THE MUNICIPALITY OF THE COUNTY OF HALIFAX**, Respondent, made on December 1st, 1987, which decision refused to amend the Municipality's Land Use By-law for Sackville by rezoning Lots 9 to 22 of Florence Place Subdivision between Kaye Street and Sackville Drive on Florence Place Court in Sackville, District 16, from R-1 (Single Unit Dwelling) Zone to R-2 (Two Dwelling Unit) Zone

BEFORE: RICHARD L. WELDON, Member

COUNSEL: RICHARD A. MURTHA LL.B and
GILES DEVEAU a/c and
PAULINE DOUCETTE a/c for the
Appellant,**FLORENCE DEVELOPMENT LIMITED**
ROBERT G. CRAGG Q.C. on behalf of
THE MUNICIPALITY OF COUNTY OF HALIFAX, a Respondent;
JOHN E. MULLEN, an Interested Person

DECISION

Pursuant to Section 16(1) of **CHAPTER 9, S.N.S. 1981, THE MUNICIPAL BOARD ACT**, the Chairman assigned Board member Richard L. Weldon to hear this planning appeal at the Board's February 18, 1988 sittings commencing at the Board Rooms of the Expropriations Compensation Board, 1660 Hollis Street, Suite 904, Halifax, N.S. commencing at 10 A.M.; some of the subsequent days of hearing were held at the Council Chambers of the Municipality of the County of Halifax (hereinafter called the "Municipality"), 2750 Dutch Village Road, Halifax, with the final day of the hearing being held back at the Board Rooms of the Expropriations Compensation Board.

A Notice of Appeal (Exhibit F-1) made under Section 63 of the Planning Act C.9 S.N.S.(1983) as amended, dated December 15, 1987, was filed with the Board on December 18,1987. By a separate letter dated December 18, 1987 and received by the Board on that date the Appellant agreed to pay the cost of advertisment of the Notice of Hearing.

The Notice of Appeal alludes to a decision of the COUNCIL OF THE MUNICIPALITY OF THE COUNTY OF HALIFAX, a Respondent, made on December 1st, 1987, which decision refused to amend the Municipality's Land Use By-law for Sackville by rezoning Lots 9 to 22 of Florence Place Subdivision between Kaye Street and Sackville Drive on Florence Place Court in Sackville, District 16, from R-1 (Single Unit Dwelling) Zone to R-2 (Two Dwelling Unit) Zone.

The Notice of Appeal states its grounds of appeal as follows:

"The grounds of this appeal are:

I.) The decision of the Council for the Municipality of the County of Halifax cannot reasonably be said to carry out the intent of the municipal planning strategy as outlined in the relevant municipal development plan;

2.) The proposed development would fully comply with the intent of the relevant municipal development plan;

3.) the decision of Council ignores the zoning characteristics of the surrounding neighbourhood and is therefore perverse in that it is contrary to and inconsistent with good planning principles;

4.) Such other grounds as may become apparent."

All jurisdictional facts necessary to establish the Board's jurisdiction to hear this appeal on its merits have been proven to the satisfaction of the Board, and the Board therefore determines that it has jurisdiction to hear this appeal on its merits.

Mr. JOHN E. MULLEN applied to be joined in the hearing as an interested person pursuant to S.27 (4) of the Municipal Board Act which states:

> "(4) The Board shall permit any person who demonstrates to the Board that he has a real and substantial interest in the subject matter of the proceeding to participate in the hearing."

In order to determine whether or not Mr. Mullen had a real and substantial interest in the subject matter of this appeal (the rezoning of property in Sackville mentioned above), the Board gave Mr. Mullen an opportunity to demonstrate his interest, if any, in the subject matter of this appeal by conducting a voir dire (or a voir dire-like hearing) as the first part of the hearing of the appeal.

On this voir dire Mr. Mullen gave evidence and was cross-examined by the Appellant's solicitor. He made to the Board submissions as to his appropriate status before the Board, as did the counsel present.

On this issue Mr. Mullen testified that he was a homeowner in the neighbourhood of the property subject to this appeal, that the proposed rezoning would so change that neighbourhood that his home would be diminished in value and that the quality of life for him in his neighbourhood would be adversely affected. He believed that he had evidence and argument to present to the Board which would help the Board in its deliberations and that he could only properly get this assistance to the Board were he to be designated an "interested person" and be allowed to participate as such as requested. He argued that these perceptions of his dealt with the issues before the Board on the appeal.

The Board notes that any person may appear before the Board and give evidence on any matter before the Board under S.27(3) of the **Municipal Board Act** "but may not participate in the hearing except as permitted by the Board." This possibility was drawn to the attention of Mr. Mullen, but he felt that he would be better able to forward his views in this appeal if he were designated by the Board to be a person who "demonstates a real and substantial interest" in the subject matter of the appeal entitled to participate in the hearing of the appeal.

In an appeal under the the **Planning Act**, from a decision refusing a rezoning application, such as this appeal, S.63 (1) of the **Planning Act** determines who may appeal the refusal. Any person who could have qualified as an appellant (had he signed and filed a Notice of Appeal in time) under S.63 (1) of the **Planning Act** would in the opinion of the Board be among those persons who could be permitted to participate in the hearing of the appeal under the provisions of S.27(3) of the **Municipal Board Act** provided they had a specific point of view or class to be represented that was not already adequately represented before the Board. (The Board must retain some degree of control of the numbers of active participants before it.)

Had he signed and filed a timely Notice of Appeal herein, Mr. Mullen, on the evidence he produced in the voir dire, would have qualified as an appellant herein since he was an "aggrieved person" within the meaning of S.63 (1) (b) of the **Planning Act** (either directly thereunder or as enlarged in S. 63(1A) (a) (i) and (ii) of the **Planning Act**) .

The Municipality, in attempting to maintain the decision of its Council to refuse the rezoning, had objectives similar to Mr. Mullen and thus its representations of interest would be similar to those of Mr. Mullen. The Municipality's interests in the appeal differed, however, to some extent from those of Mr. Mullen. The Municipality stands to make a net gain of assessment from a fixed piece of real estate should the land be developed to the maximum permitted by the proposed rezoning. Mr. Mullen stands to make little financial gain from the rezoning in any conceivable reasonable situation: the rezoning would probably cause him a discernable loss in the market value of his home.

Mr. Mullen believes that the rezoning will adversely affect the lifestyle enjoyed by himself and his family in the neighbourhood. The Municipality, while it may be concerned in an abstract way, with the effect of the rezoning upon its inhabitants in the neighbourhood can, of course, suffer no effect of the rezoning on its lifestyle which it does not, as a body corporate, possess.

In the opinion of the Board, the Municipality is the only party before the Board whose interests to some extent coincide with the interests of Mr. Mullen. The Board is of the opinion that there is a sufficent divergence of interests between Mr. Mullen and the Municipality so that Mr. Mullen would not thereby be disqualified to be designated by the Board to be a person who "demonstrates a real and substantial interest" in the subject matter of the appeal entitled to participate in the hearing of the appeal. The Board is also of the opinion that he has a real and substantial interest in the rezoning appeal being conducted herein and, of course, he has demonstrated to the Board that interest and thus is entitled to participate in the hearing of this appeal as an "Interested Person".

The subject land to be rezoned is part of a lot of land lying to the southeast of lots 8 and 23 of what is now called "Florence Place Subdivision" in Sackville and is proposed almost in its entirety to be a south easterly extension of that subdivision to comprise lots 9-22 inclusive of that subdivision. For the purposes of this decision, the whole of Florence Place Subdivision comprises, when consolidated with its older portion of lots, lots 1-29 inclusive and Florence Place Court (its central roadway). The whole of the land not previously developed and owned by the present Appellant (at the time before the proposed development of the present part) is graphically shown on a circular insert on a plan "Florence Place Subdivision" before the Board as Exhibit F-18. On this insert the total lot has a street frontage to its east on Kaye Street and a street access to its north-westerly on Florence Place Court. This area is lightly shaded on the insert and is marked thereon "Area of Survey". On the same insert, and shaded more darkly is an area marked thereon "Florence Place". That darker area shows graphically the development encompassing lots 2-8 inclusive and lots 23-29 inclusive and is an area of land that was the subject matter of a previous rezoning appeal before the Board in Oakdene Estates Limited v. County of Halifax (1986) 5-B M.B.D. 571 (hereinafter referred to as Oakdene II) [1]. Apparently part of the shaded areas were subjected to scrutiny, at least, in a previous planning appeal before this Board Oakdene Estates Limited v. County of Halifax (1985) 4-B M.B.D. 1 (hereinafter called Oakdene I) [2].

Oakdene I_2 was an appeal to allow a rezoning on the lands therein dealt with from R-1 to R-4: the Board, on appeal, did not allow that rezoning. Oakdene II_1 was an appeal to allow a rezoning of the land therein described from R-1 to R-2: the Board, on appeal, allowed that rezoning for 13 of the 14 lots applied for. The present rezoning application encompasses the lighter shaded area marked "Area of Survey" on the circular insert on Exhibit F-18 less that land which fronts on Kaye Street which has been subdivided from the rest of the land, sold as zoned (R-1), and developed to its R-1 zoning by the installation of a single family residence fronting on Kaye Street thus depriving the subject land of its former access onto Kaye Street. The area of land subject to the rezoning proposed herein, after deletion of the Kaye Street lot, contains about 2.9 acres. The topography of this land is set out in a quotation from a staff report of November 9, 1987 contained in Exhibit F-11 called by the Board the "Municipality's Booklet".:

> "The entire parcel of land is heavily forested with a mixture of soft and hardwood trees and remains undisturbed except along the proposed road access where grubbing has taken place. The land is situated on a ridge, with a predominant downward slope in a north to south direction. From the northern lot boundary abutting residential properties on Kaye Street to the southern lot line, the natural ground elevations drop roughly 33 feet...for an average slope of 11%."

Mr. Murtha called as his witnesses Giles Deveau (as to service of various notices), Paul Morgan, Dr. Ross Ainslie, Bruce Hubley, Donald Mason and Joseph Francis Morrison. Mr Mullen, Third Person, testified on his own behalf as did Clarence Ayers, Elva Walters, Ann Gray, and Paul Hyland. Mr Cragg on behalf of the Municipality called William Butler and Councillor Lazlo Lichter; and Mr. Murtha called no rebuttal evidence.

Giles Deveau, articled clerk associated with Mr. Murtha gave extensive viva voce evidence concerning his efforts directed to serving various notices required by the Planning Act and the rules made thereunder.

Paul Morgan a planner for the Policy Division of the Municipality testified as to the advice and information he had given Mr. Deveau in aid of Mr. Deveau's attempt to serve properly the notices required to be served in order to perfect this appeal.

Dr. Ross Anslie, veterinary surgeon, of 6930 Quinpool Road, Halifax, was the President and major beneficial owner of the Appellant. Dr. Ainslie said the Appellant had acquired the subject land in the spring of 1987 from its previous owner Oakdene Estates Limited as well as the former land zoned R-2 as a result of the decision in **Oakdene II** $_1$. The subject land is contained in what the Board will now refer to as Phase 2 of the Florence Place Subdivision (Phase 2) and the lands rezoned in **Oakdene II** $_1$ (with the exception of some slivers thereof that may be contained in Phase 2) will be referred to by the Board as Phase 1 of the Florence Place Subdivision (Phase 1).

Dr. Ainslie said the Appellant was attempting to sell the approved lots in Phase 1 and that some of those lots had been sold and were being built upon. (At the time the Board viewed the site at or near the last day of its hearing more lots than the other evidence disclosed were being built upon in Phase 1.)

Dr. Ainslie also noted that the land facing on Kaye Street had been subdivided from the subject property and been sold and developed as a R-1 lot with its street access to Kaye Street only. He said that this sale was made to increase the positive cash flow of the Appellant which was somewhat lean after its heavy land purchases in the area, but that it was also made to defuse certain public objections to the present rezoning based on possible R-2 intrusion by this proposed development into an adjacent area developed in single family homes along Kaye Street.

Dr. Ainslie said that he believed the development of the subject lands to its as-of-right R-1 use would not be an economically sound proposition for the Appellant (or for any other developer) given the present state of demand for single family homes in the area, the difficulty of developing the site from its topography as outlined above, and the nature of the planning law which applied to the subject land. Dr. Ainslie felt there was a good market for the 2 unit residences that would be permitted by the rezoning and that the extra development costs on a difficult residuary site could be more easily spread over two residential units per lot than over one residential unit per lot.

Dr. Ainslie said he was basically the financial support for the Appellant in this development, that he had hired the engineering firm of Porter Dillon and Associates to plan and lay out the subject property to be an economically sound and appropriate development within the Municipality's Municipal Planning Strategy for Sackville (MPS) and he left that aspect of the development to them, confident in their ability to design and create a proper development of the subject lands.

In relation to the detailed day-to-day management of the Appellant with especial reference to the development of the Appellant's lands all along Florence Court (both in being and proposed), Dr. Ainslie said he had delegated Mr. Bruce Hubley, a lawyer and employee of the Appellant, to perform such functions. Dr. Ainslie thus claimed he had very little detailed knowledge of the Appellant's proposed development and if the Board needed detailed information concerning the proposed development it should be able to acquire that knowledge from such sources as Porter Dillon and Associates and Mr. Hubley.

Dr. Ainslie said Bruce Hubley was also a shareholder in the Appellant.

On first cross-examination conducted by Mr. Mullen, Dr. Ainslie said he didn't know by what majority Council had voted to refuse his rezoning application. He said the development of 28 households on 14 lots would remove some of the present tree cover on the land. He said the sale and development of the R-1 lot facing on Kaye Street removed the possibility of easy vehicular and pedestrian access to Kaye Street from the proposed Florence Place Court. Dr. Ainslie implied that this restriction of easy pedestrian and vehicular access (preserving, perhaps certain water line easements-see Exhibit F-17 and the second sheet of Exhibit F-14) was done to appease the public resistance to the proposed rezoning of the existing neighbours inhabiting single family houses.

Dr. Ainslie (second cross-examination conducted by Mr. Cragg) agreed that the lots of the proposed development would have less depth than the lots located in the Phase 1.

Dr. Ainslie said he was willing to place development restrictions on the lots in the proposed development to help alleviate the fear of loss of buffering occasioned by the indiscriminate cutting down of trees on the lots when they were being developed.

Dr. Ainslie said he had never met with the residents opposed to his development in any attempt to explain its merits to them.

Dr. Ainslie was aware that the cul-de-sac at the far end of the proposed Florence Place Court was touching the line of adjacent properties and allowed no real tree buffer with the adjacent lands.

Mr. Robert Gough, an employee of the Municipality's Planning Division had, according to Dr. Ainslie, told the doctor that the subject land could be rezoned as the Appellant had requested. Dr. Ainslie was also aware of the refusal of the Council and the Board to allow R-4 rezoning in Phase 1 as evidenced in the Board decision in Oakdene I_2. (Mr. Cragg did not ask the doctor whether he was aware of the Board's approval of rezoning of Phase 1 to R-2 as evidenced by the Board's decision in Oakdene II_1). Dr. Ainslie said he was "shocked" by Council's refusal to grant the rezoning he had applied for for Phase 2 .

Mr. James Jagosh, 19 Redbank Road, Bedford, C.E., was qualified (after a voir dire as to his qualifications) to give expert opinion evidence as a Civil Engineer respecting the design and provision of services and supervision of the installation of sewer, water, drainage, and internal road systems for small scale residential developments in Sackville such as the proposed development.

Mr. Jagosh, an employee of Porter Dillon and Associates, was responsible for their design of the proposal for development of Phase 2 which is the subject matter of this appeal. He interpreted for the Board Exhibit F-14 which consists of three pages of drawings as folows:

1. Site Grading and Drainage
2. Plan/Profile
3. Cross Sections

Mr. Jagosh also explained the sewer easement and sewer work that was done in Phase 1 shown on Exhibit F-18, a Plan of "Florence Place Subdivision", was done at the expense of the Appellant to alleviate certain sewer problems associated with both phases of the development. Mr. Jagosh was of the opinion that all engineering problems of the subject development had been sucessfully addressed by Porter Dillon and Associates on behalf of the Appellant and that the proposed development had no problems of an engineering nature which would have prevented its approval by Council.

Mr. Jagosh said that the general sewer system of Sackville was subject to an excess of groundwater incursion into its system which limited the peak load of sewage it was capable of handling to an amount considerably less than the capacity to handle sewage for which the sewer system was designed. He was unable to determine whether or to what extent that loss of capacity to handle sewage resulted from unanticipated infiltration into the sewer system from groundwater sources surrounding the installed sewers and how much of the unwanted water resulted from illegal connections discharging water into the sewers. In the opinion of Mr. Jagosh, although the capacity error found in practice in the general design capacity of the sewers is a problem, it is a problem common to all Sackville and must be dealt with as a problem affecting the whole community. Mr. Jagosh felt that a proposed development of the subject lands to a density of R-2 (as opposed to its as-of-right development to a R-1 density) would not unduly affect the general problem of Sackville which was that its sewer system was designed to demand specifications which underestimated in a material way the actual demand to be placed on the sewer system by the actual development of Sackville. Regardless of the design shortfall in the Sackville sewage disposal system, Mr. Jagosh said there was sufficent available capacity to accommodate the minimal additional strain to the system which would be caused by the proposed development and that there was sufficent unused capacity in Sackville's sewer system to permit other developments additional to the present development while allowing time for the excessive infiltration problem to be addressed by engineering initiatives which might identify the sources of the problem and suggest appropriate solutions therefor.

Mr. Jagosh said that the maximum lot coverage permitted for R-2 use under the relevant regulations in the Sackville area was no larger than that permitted for the existing R-1 permitted use. He felt there would be no more disruption during the construction phase of the proposed R-2 development than there would be were the same property to be developed to its as-of-right R-1 use. Buffering by the retention of tree cover, according to Mr. Jagosh, would be equally good (one might say equally bad) whether the subject property were developed as R-2 or whether it were developed to its presently allowed R-1 use. He noted that the proposed subdivision had only one access for pedestrian and vehicular traffic and that was its exit along Florence Place Court to Florence Street.

In the opinion of Mr. Jagosh, the proposed development was a development to medium density residential.

Mr. Jagosh said because of the slope of the development towards Sackville Drive the site was somewhat expensive to develop and the increase in density proposed made the proposal from the economic point of view more feasible to develop.

Under cross-examination by Mr. Mullen, Mr. Jagosh said the existing construction in Phase 1 (as it was then in the ground) because of the strong similarities in the two sites would be similar to the construction proposed in Phase 2. He agreed that on some lots any natural tree buffering would be "scanty" because of the lack of depth in some lots. Mr. Jagosh conceded that the slopes made development more difficult but that the land was "developable" as proposed. Mr. Jagosh says that the visible erosion seen on the construction sites of the homes under construction in Phase 1 will become controlled when construction is finished and the land becomes stabilized by the usual post-construction landscaping on the individual lots.

Mr. Jagosh says the lots on the Sackville Drive (or downhill) side of Florence Place Court will be more difficult to build on than the lots on the uphill or opposite side of Florence Place Court. Mr. Jagosh conceded there were no sidewalks either within the subject subdivision or on Florence Street or other connecting streets to allow the children likely to inhabit the proposed development to go to and from school except by walking on the public streets designed and used for vehicular traffic.

Under Mr. Cragg's subsequent cross-examination, Mr. Jagosh conceded that the average lot size proposed for Phase 2 was signifigantly smaller than the lot size established in Phase 1 and already zoned R-2. He said, however, that all the proposed lots were in excess of the 6000 square foot minimum size R-2 (and for that matter R-1) lot. He conceded that a typical R-1 home might have a smaller lot coverage than a typical R-2 home but Mr. Jagosh noted that the maximum permissible lot coverage under each type of zone was identical.

On Exhibit F-17 (another copy with some additional marking of the Site Grading and Drainage plan which is page 1 of Exhibit F-14), Mr. Jagosh had marked in a light green the portion of the proposed lots which would not necessarily be interferred with during the course of construction thereon. He also marked in red his concept of the existing zoning surrounding the proposed development.

Mr. Jagosh said his firm had been involved in the Oakdene Company's efforts to develop the subject land, that he was not familiar in detail with the Sackville's Municipal Development Plan (now its MPS) and that he hadn't read the two previous Board decisions Oakdene I[2] and Oakdene II[1] which concerned the rezoning of Phase 1.

Mr. Bruce E. Hubley, a lawyer by profession, testified that he was employed by the Appellant to manage the land development schemes of the Appellant among which the present proposal is one.

Mr. Hubley said that the Appellant had purchased Phase 1 and Phase 2 lands in two separate purchases after clearing up of encumbrances that attached to Phase 2. He said that the Appellant had "inherited" Porter Dillon and Associates from the previous developer.

During and since the purchase by the Appellant, Mr. Hubley had inquired of a Mr. Paul Morgan of the "County Planning Office" for information and advice concerning the development of the subject land. He said he had also read portions of the MPS he considered applicable to the proposed development. In his studies and general conversations with Municipal planning officials concerning the present scheme, Mr. Hubley sensed a general agreement with the proposal and thus he was surprised by the final recommendations by the planners against the proposed rezoning.

Mr. Hubley had formed (and still holds) the opinion that the proposed rezoning is fully within the intent of the MPS.

Mr. Hubley pointed out that the lands between the proposed development and Sackville Drive were essentially commercial in use. This commercial use encompassed one side of the "four" sides of the proposed development. He noted that Phase 1 was R-2 zoned and included another of the project's four sides. At the cul-de-sac end of the proposed development there were two narrow strips of R-1 zoned land reaching back from Sackville Drive where they had their street frontage. Just beyond these two strips, which together measure about 30 meters in width, is a large block (zoned R-1) of land which fronts on Sackville Drive and is subject to a Development Agreement providing for a commercial use of this large block of land (This land was called by a witness, Mr. Paul Hyland, "Henry Poole's Property"). Part of the subject land (proposed lot 15) abuts this large block of land directly. This is another of the four sides of the proposed development according to Mr. Hubley. The fourth and last side of the proposed development was bounded by the back of the R-1 development and zone which faced on Kaye Street.

Mr. Hubley alluded to other developments in the "neighbourhood" of the proposed development such as certain 4-storey apartment buildings on Kaye Street and certain construction office uses on the same street and said these differing uses indicated that the neighbourhood of the proposed development was not exclusively a R-1 neighbourhood and that the proposed R-2 development was compatible with the neighbourhood as it presently exists.

Mr. Hubley stated that it had always been the intent of the Appellant in constructing the proposed development that it would leave a greenbelt of existing trees to buffer the rear of the lots fronting on Kaye Street from the worst effects of the proposed construction on the uphill side of Florence Place Court. Mr. Hubley gave no specifics of how the Appellant would achieve this goal.

Mr. Hubley said the sidewalks (or lack thereof) in the area was a Municipal responsibility and not a responsibility of the developer.

Mr. Hubley said he, and not a Mr. Kevin Ainslie, submitted the application to rezone to the Municipality for approval.

In response to questions from Mr. Mullen, Mr. Hubley said that in order to construct the entrance on Florence Place Court from Florence Street a house located at 15 Florence

Street was demolished and the entrance roadway was constructed running over the former lot at 15 Florence Street.

Mr. Mullen asked Mr. Hubley questions concerning schools, transportation, sidewalks and how these would be impacted by the proposed development.

Mr. Mullen confronted Mr. Hubley with the proposition that the development could not be built leaving any buffer between the R-1 and R-2 uses.

Under cross-examinination by Mr. Cragg, Mr. Hubley said he was not legally a part owner of the Appellant.

Mr. Hubley said the Appellant had not purchased the lands in Phase 1 from the previous owner until May of 1987. The Appellant, according to Mr. Hubley, was awaiting final subdivision approval of the lots in that phase of the development.

Mr. Hubley said the lots in Phase 2 have only preliminary subdivision approval and cannot therefore be sold as individual lots at this time until they are finally approved by the Municipality's development officer.

Mr. Hubley said that lot 9 of Florence Place Subdivision is located mostly in Phase 1 but is partly within Phase 2. He is of the opinion that the whole of Lot 9 was already zoned R-2. If he is correct in this (and he appears to be if one peruses and agrees with the "INSET" on the top of Exhibit F-18) then a small sliver of land on Lot 9 may be already zoned R-2 or , conversely a small portion of Lot 8 may be zoned R-1. He admits there is presently no buffer between the R-2 zoned land in Phase 1 and the R-1 zoned land in Phase 2.

Mr. Donald Mason, 6960 Mumford Road, Halifax, a Planner at Planners Atlantic Limited, qualified as an expert in land use planning entitled to give opinion evidence in planning matters as they affected Sackville.

Mr. Mason said he was familiar with the MPS for Sackville and also with its Land Use By-Law (LUB) and the materials contained in the "County Booklet" (Exhibit F-11).

Mr. Mason believed P-29, P-31, and P-104 of the policies contained in the MPS pertained to the present application to rezone. He was also familiar with Exhibit F-18. He had prepared Exhibit F-26 which is a montage of photographs of certain areas in the neighbourhood of the proposed development.

Mr. Mason evidently is the author of a colour coded zoning diagram of the proposed development and its surroundings being Exhibit F-27. Mr. Cragg objected to the admission of this diagram on the grounds it was incorrect. Mr. Mullen supported Mr. Cragg's objection. At that time the Board noted both objections and said that the objections as founded were better objects of cross-examination and /or evidence in contradiction or explanation than of exclusion as being inadmissable. In the view of the Board, the diagram may, or may not, have been correct: it was, however, relevant.

Mr. Mason believes the intent of the MPS is to develop the serviced undeveloped residentially designated area of Sackville with "a variety of housing". He noted that all the proposed lots were slightly larger than the minimum 6000 sq. feet required for serviced R-2 lots in the Municipality. He said there was no requirement that the existing tree cover be maintained on the subject property even if it continued in its present zoning. Since the tree cover could be removed by the owner of the land in any event, Mr. Mason felt that the discussion of buffering by tree cover between development on the subject lands and the lands already developed on Kaye Street was moot.

Mr. Mason believes the present proposal is within the intent of the MPS. He noted that, in his opinion, the Board in its decision in Oakdene II[1], a case based on facts almost identical to the case at hand, correctly interpreted the intent of the MPS and decided, contrary to Council, in favour of R-2 rezoning. Mr. Mason felt that decision supported his interpretation of the intent of the MPS which said the present rezoning was within that intent and that the decision of Council appealed from herein did not reasonably meet the intent of the MPS.

Dr.Joseph Francis Morrison, C.E.O. of the Municipal School Board, testifed concerning the difference it would make to the Municipal School System if the subject lands were zoned and developed as R-2 rather than developed to their as-of-right R-1 use. He concluded that there would be no difference between the two (significant to the School Board) since the development, under either zone, would be so small.

Mr. John E. Mullen, 96 Bellshire Avenue, Sackville, retired, testified on his own behalf and tendered for the record a summary of his remarks which are Exhibit F-28 in which he writes:

" I, J. Edward Mullen, as a taxpayer, homeowner, and representative of the community of Sackville, have availed myself of all the relative and pertinent facts on said development, presented written letters and a petition, and also photographs on the above mentioned subject.

On the basis of all this , I specifically reject the appeal to rezone lots 9 to 22 in Florence Place Court from Single Unit Dwelling (R-1) zone to Two Unit Dwelling (R-2).

Furthermore, I reject in total, both Phase 1 and 2 of Florence Development Limited (formerly Oakdene Estates Limited) based on all of the facts and documentation as I know them, which indicates misleading and contradictory information, biased "expert" witnesses, and questionable Municipality manoeuvers.

With all respect for the authority of the Nova Scotia Municipal Board, I honestly believe the Board was mislead, and the legal interpretation incorrect.

Therefore I request a moratorium on any further progress of development in this subdivision, and the matter be passed to the Minister of Municipal Affairs, of the Province of Nova Scotia, for final legal scrutiny and decision.

On behalf of the community of Sackville, and myself, I sincerely thank you for this unique oppotunity [sic] to be considered and heard."

Mr. Mullen in his testimony referred to P-104 and P-31 as policies contained in the MPS as he understood them and as he felt the Board should apply them.

Mr. Cragg objected to questions asked Mr. Mullen by Mr. Murtha during the latter's cross-examinination of the former on the grounds that the cross-examinination did not "get to the issues on the appeal." The objection was noted, repeated and the cross-examination was allowed to continue. Mr. Murtha objected to the Board hearing any evidence from this witness since he said the witness had been in conversation with one Mr. Paul Hyland concerning the appeal over the adjournment period after he had commenced giving evidence and before his evidence had been concluded. After some discussion between the Board and Mr. Murtha, Mr. Murtha withdrew his objection and the cross-examination continued to its conclusion.

Mr. Clarence Ayers, 194 Kaye Street, Engineer, gave evidence on his own behalf. He said he had testified in the hearing of the appeal in Oakdene II [1] against the rezoning in Phase 1. He filed his notes on which his evidence was based as Exhibit F-29. In that evidence he expressed the view that the economic advantage to the developer in being allowed to build R-2 units would work to the economic detriment of the owners of single family homes on Kaye Street whose properties would be devalued by the construction of duplexes on Florence Place Court.

Mr. Ayers felt that Dr. Ainslie was not so naive in planning matters as his testimony might indicate. To the contrary, Mr. Ayers believed that Dr. Ainslie held a respected position in the community, was financially strong and had "personal contacts" which would assist him in achieving the successful development on the subject land. Some quotes from Exhibit F-29 will serve to highlight Mr. Ayers' evidence:

> "The acerage [sic] of the property in question is considerably smaller than the approved Phase One. Yet the developer is requesting the same no. off [sic] units (14) to be built on this property-(2.9-4.6 acres)
> ...
> they neglected to mention the second driveway. ...
> the area in way of 194 Kaye Street would not have enough vegetation remaining to support a mouse. ...
> water does run downhill; a number of houses on Kaye St have basement garages; at the foot or bottom of the driveway there is a large drain; fitted with a four inch pipe extending to the back of the property. Has any consideration been given to disposing of this water?
>
> Haveing [sic] had a number of conversations with Kevin Ainsley during May June July August of 87, attended the PAC Hearing and has been present for the the majority of this Municipal Board hearing I find the reasons for requesting a zoning change rather conflicting. ... the lack of progress to date...the fact that this company had only 2 R1 Lots; One on No.1 Florence Court, a very poor lot at that; the other R1 at 186 Kaye St. has both been developed & sold.versus the 14 in No. R2 lots on Florence Place Court with one or maybe two sold & not developed to date.
>
> The fact that there was no encouragement or interest shown towards potential buyers for lots in Phase (2) zoned R1 leads me to be very suspicious of this developers intent.
>
> You know what I think; this developer was going to catch the same gravy train Oakdene Estates caught, and ride off with the pot of gold."

Mrs. Elva Walters, Kaye Street, secretary, also testified on her own behalf and filed her notes with the Board as Exhibit F-30. Excerpts from F-30 are as follows:

"I have been a resident of Kaye Street, Lower Sackville for seventeen years. When my husband and I built our home we were of the understanding that the land directly behind us was designated as a Green Belt and the land next to that (which is the land in question here today) was zoned R1.

I oppose the rezoning of the land because:

(1) it will lower the assessment value of our property; this is a developer making money at our expense.

(2) there is no designated pathway from the development to Kaye Street and therefore people will be taking short cuts through the property of people on Kaye Street to get to the Elementary [sic] and Junior High Schools which can be reached easily off Kaye Street;

(3) the developer is selling these lots with very few requirements to be met by them. This, in my mind leaves no protection for the residents on Kaye and Florence Streets as regards a buffer between the zones.

(4) when people move into an area, knowing the zoning and an application for rezoning is brought forth and then when the residents try to make known that they don't approve of the change and it happens anyway the faith in the system is lost.

(5) the land is zoned R1-develope [sic] it R1.

to think this is all for some developer to make a quick buck and get out.

So much for Progress!!"

Mrs. Ann Gray, 206 Kaye Street, R.N., spoke on her own behalf and filed, in a letter form, her remarks which is Exhibit F-31. Pertinent extracts from Exhibit F-31 are:

" This area is one of single family dwellings and so a change to duplexes would alter the character of the neighbourhood.

...

...Nov.5 1986,...the planning advisory committee voted to study R-2 development, especially in Sackville. This was because of the increased number of requests for zone changes and the concern of too many duplexes being built. Duplex construction made a leap from 84 starts in 1985 to 224 in 1986....perhaps we should return to single houses.

A duplex, built on a lot size meant for a single dwelling, means two families sharing a single backyard. The lots behind my house are not level making landscaping difficult. The level part is at the very back where all the shrubs and few trees are located. In order to have a yard, these trees would have to be cut down. Thus removing the very poor buffer area that has been left.

...

There is no link for cars between Florence Place and Kaye Street...children travelling to school will take the shortest route-through backyards to Kaye St...depending on their ages...Sackville Centennial, A.J. Smeltzer Jr. High and Sackville High School.

The purchase price of a single family house usually declines if there are duplexes in the area. After living in my house for 15 years and maintaining it, I do not wish to see my investment reduced."

Mr. Cragg called Councillor Lazlo Lichter, Dutch Settlement, as the Municipality's first witness.

Councillor Lichter has been a school principal although he is now retired. For some time he has been a member of the Municipality's Planning Advisory Committee (PAC) and is currently the Chairman of that committee. He is Chairman of the Municipality's Board of Health and has been for 5 years. In his various functions as municipal councillor, Councillor Lichter says he is regarded by his associates on Council as being a fair and neutral "middleman" in respect to his functions on the PAC and a "workhorse" in relation to all his council related duties. He believes such regard by his fellow councillors is not an unfair assessment reflecting his own view of the proper effort he must expend in order to fulfill, properly, the offices to which he was elected.

Councillor Lichter said he had participated in the plan review which lead up to the adoption of the MPS for Sackville. He is for that reason, as well, familiar with the Sackville MPS and its concomitant LUB.

Councillor Lichter said he was familiar with the documents in Exhibit F-11, the subject property, and the present application to rezone.

Councillor Lichter said he was familiar with the rezoning of Phase 1 to R-2 which had been ordered in Oakdene II [1]. He said he had voted for that rezoning in the first instance as "the lesser of two evils"; the greater evil being the R-4 rezoning advocated-and almost suceeding- in Oakdene I[2].

Councillor Lichter chaired the meeting of the PAC which unanimously recommended to Council that the present application not be advertised for public hearing, i.e. that the rezoning application be rejected. He said that as general policy PAC does not act in such matters in any "public hearing" mode but on this occasion three non-committeee members attending the meeting expressed a wish to be heard. The committee heard from two of them, Mr. Ayers (against) and Mr. Hubley (for). Councillor Lichter had requested that these gentlemen restrict their remarks to the issue before the PAC namely whether or not there should be a public hearing before Council but he said they did not carefully follow his instructions in that behalf.

Councillor Lichter does not recall Mr.Hubley referring to either the LUB or the intent of the MPS in the course of his remarks to the PAC. He does recall Mr. Hubley saying the R-2 zoning was needed to give the developer an economic return on his development of the subject land.

Councillor Lichter says the PAC consists of 12 members (10 elected councillors and two persons appointed by Council). He said Mr. Paul Hyland was one of the non-elected PAC members present at that meeting.

Councillor Lichter said, as Chairman, he didn't vote in PAC on the recommendation of refusal of the present rezoning application since the decision of the other members was unanimous and he, as chairman, usually only votes at PAC in the event of a tie.

Councillor Lichter said that staff report on this rezoning application presented to PAC (and subsequently to Council) was full and adequate and addressed all his concerns. He felt if he had had any questions at the time he would have expressed them and the minutes would have reflected those questions. There is no such reference in the minutes so the councillor concludes that he was satisfied in all respects with the rejection of the present application by PAC.

PAC's recommendation went to Council December 1, 1987 and to Councillor Lichter's memory Council unanimously agreed with the recommendation of PAC not to have a public hearing of this rezoning application thereby rejecting it.

Councillor Lichter agrees that the subject land lies within the Urban Residential Designation shown on the Generalized Future Land Use Map of the MPS and is thus capable of being rezoned by Council. He said Council was governed in its decision by the intent of the MPS as exemplified in P-29. Councillor Lichter believed that P-30 of the MPS gives priority to preserving existing single family residential development against conflicts with proposed alternative residential uses which need to be supported by rezoning amendments in order to become effective. In the view of Councillor Lichter, Council must also consider P-31 of the MPS but it has a discretion under that policy to accept or refuse the rezoning applied for and, regarding the present application to rezone, Council exercised its discretion by refusing to rezone.

According to Councillor Lichter, Council had no need to look at P-104 of the MPS if it had previously decided under P-31 that it would exercise its discretion against the proposed rezoning.

Mr. Mullen questioned Councillor Lichter concerning Mr. Kevin Ainslie's part in the presentation of the application for rezoning before the various Municipal bodies.

On cross-examination by Mr. Murtha, Councillor Lichter agreed there was an increasing demand in the Sackville area for housing other than single family and a good demand for duplex housing. Councillor Lichter felt these demands for 2 unit housing were intended to be met, under the MPS, in appropriate areas of Sackville.

Councillor Lichter agreed there was in the MPS no definition of "neighbourhood" as used in the MPS residential policies. He felt that neighbourhood, as a necessity, was an elastic term to be interpreted in various ways in accordance with the context in which it was found. In the context of this appeal Councillor Lichter felt he had a proper understanding of the word "neighbourhood" as it was used to determine the proper result for the zoning application he had to consider when applying the phrase "integrity of the neighbourhood" found in the relevant policies of the MPS.

Councillor Lichter said the staff report to PAC and Council was signed jointly by Ms. Valerie Spencer, the Municipality's Chief Planner, and also by the CAO of the Municipality but, regardless, he felt that the report had been written by another planner, probably Mr. Paul Morgan .

Councillor Lichter said the lands rezoned in Phase 1 were different from the lands proposed to be rezoned in Phase 2 in the following respects:

1. There were two different pieces of land.

2. The average lot size proposed for the lots in Phase 2 were much smaller than the average size of the lots found in Phase 1.
3. Staff recommended, in order, R-4 rezoning and, failing that, R-2 rezoning for Phase 1: Staff recommended retention of the R-1 zoning for Phase 2.

Councillor Lichter regarded himself, as a general rule, as being in "favour of the developer" and he considered himself quite capable of resisting any undue "political pressure" from local residents protesting a rezoning. In this case, he said he would have formed the same opinion against the rezoning regardless of any political activity of the residents of the nearby streets.

Councillor Lichter could see nothing strange, given the recent Board decision in Oakdene II[1], in the Council unanimously refusing to allow the present application to go to public hearing.

Mr. Paul Hyland, Accountant, 59 Belleshire Drive, Sackville gave evidence on his own behalf.

Mr. Hyland is a member of the PAC and was Chairman of the Public Participation Committee which was heavily engaged in the hearings and studies which went into the adoption by the Municipality of the MPS.

Mr. Hyland felt the intent of the MPS that the subject lands (designated as Urban-Residential) were not intended, under the MPS, to receive vehicular access from Florence

Street. He said the intent of the MPS was to access these lands from Sackville Drive.

In that respect Mr. Hyland said P-103, P-60, P-61, and P-104 of the MPS were applicable to the proper development of the subject lands.

Mr. Hyland noted that "Henry Poole's property" (a large block of land mentioned above running from Sackville Drive and passing by the proposed turning circle at the far end of Florence Place Court) was zoned R-1 but was permitted its commercial use pursuant to the terms of a development agreement. Mr. Hyland said that a couple of large apartment buildings zoned R-4 near the same area on Kaye Street merely represented a case of a zone being created to reflect the use of the property at the time of the initial zoning of the area.

Mr. Hyland felt that the developer in this case had received a fair hearing of his rezoning application and that Council had made the right decision.

Mr. Hyland said the subject lands might originally have been part of the Sackville land development scheme owned by the Nova Scotia Housing Commission (of which land development project the subdivisions on Kaye Street and Belleshire Drive had also formed a part) and, in any event, were shown as green belt on the plans for the lands made by the Nova Scotia Housing Commission. The land so designated had never been deeded to the Municipality by the Housing

Commission. If the land in question had truly at one time been owned by the Nova Scotia Housing Commission, Mr. Hyland felt the failure so to convey the subject land was unfortunate.

Under cross-examination by Mr. Murtha, Mr. Hyland said he could not remember whether he had participated as a member of PAC in the decision making process that had ended with the decision in Oakdene I_2 and Oakdene II_1 although he was a member of PAC while both applications were under consideration by the Municipality

At the December 30, 1987 meeting of the PAC which considered the present rezoning application, Mr. Hyland was in attendance and, according to the minutes of the PAC, actively participating in the discussions between the Committee and Mr. Hubley. These discussions amounted to Mr. Hyland questioning Mr. Hubley whether he was going to appeal any negative decision of Council.

In discussion with the Board, Mr. Hyland said that he, as an active constructor of the MPS, had understood and expressed the true intent of the MPS as it affected this particular application and as it affected the Phase 1 rezoning. Consequently, in the view of Mr. Hyland, the Board's finding of the intent of the MPS made in the decision in Oakdene II_1 was erroneous and therefore that decision was wrong. That decision, being wrong, would have no persuasive effect on the outcome of the present appeal:

in the view of Mr. Hyland a wrong decision is no precedent at all.

Mr. Cragg, in the resumption of his case called Mr. William Butler, Manager, Policy Division, Planning Department of the Municipality. Mr. Butler, a planner, was qualified by the Board as an expert witness entitled to give opinion evidence in planning matters as they affected Sackville.

Mr. Butler said that, although a Mr. Paul Morgan was the author of the Staff Report alluded to above, he had edited the report and was responsible for its contents with which he was in full agreement.

Mr. Butler categorized the proposed development as a "small to medium" development.

Mr. Butler believed that the proposed development had to be tested against the mandatory provisions of P-29 and also of P-30 of the MPS. His interpretation of those provisions of the MPS said the priority of Council's consideration of the rezoning application was to be given to existing residential units as opposed to the desires of persons who may be the owners of residential units yet to be built.

Mr. Butler felt that trying to integrate R-2 buildings into an existing R-1 neighbourhood, as he said this rezoning application did, would create problems.

Mr. Butler supported the Council's decision as being within the intent of the MPS.

Mr. Mullen's examination of Mr. Butler concentrated, over the objections of Mr. Murtha, on Mr. Butler's opinions of Mr. Mullen's actions as a public spirited citizen participating in planning matters which affected his community.

Mr. Butler, in response to questions from Mr. Murtha, said he had not been on the site of the proposed development before February, 1988. He said the Staff Report tendered differed in format from the staff reports that had been filed in the two rezoning applications that had been made in respect to the land located in Phase 1.

Mr. Butler said he had no concerns of the Staff Report change in format. The Board asked him if he were aware of the guidance on preparing a staff report contained in the Board decision Benedict v. Town of Truro (1985) 4-B M.B.D. 291_3. (At p328 of that decision, the three person Board had this to say concerning information to be put before Council:

> "The Board has no hesitation in saying that the intent of Policy 501 and in particular the opening part of it, is that the Council shall regard, at least, all the items therein contained and that it violated that intent when according to the Planner, HE SAYS HE CONSIDERED all these aspects and Council delegated to him these considerations. Council cannot do that. It must consider all items set out in policy 501 and it cannot delegate this function." [By its actions in formatting the report of staff as was done here, planning staff did not create any record which would demonstrate that Council had all the criteria of P-106 drawn to its attention and thus there is no documention that the decision of Council was made with the full information which would tend to demonstrate that the decision was within the intent of the MPS.])

Under questioning by the Board, Mr. Butler agreed that Section 51 (1A) of the Planning Act required that an amendment to the LUB, such as this proposed amendment, can only be made by Council "In accordance with policies contained in the planning strategy." He conceded that in adopting or amending a land use by-law in any manner, Council, restricted by Section 51 (2) of the same statute, cannot adopt or amend a land use by-law "except to carry out the intent of a [its] municipal planning strategy." Mr. Butler further agreed that the intent referred to in the preceeding portions of this paragraph is the same intent to be determined by the Board under Sections 63 (3) and 63 (5) of the Planning Act. He conceded that the Board had determined the intent of the MPS allowed R-2 development in Phase 1 in Oakdene II$_1$ and that decision of the Board had not been appealed. He then told the Board that he was familiar with the decision of the Board in Oakdene I$_2$ in which Council and the Board had both decided that R-4 development was too dense for Phase 1 and that that decision of the Board had not been appealed. The Board then asked Mr. Butler whether he agreed that the decision in Oakdene I$_2$ supported a proposed R-4 development on the Phase 1 site (pursuant to a development agreement if one had then been possible) of 70 apartment units but turned down the as-of-right development for that site of some 130 apartment units which would have flowed from a rezoning to R-4. Mr.

Cragg strenuously objected to this questioning by the Board on the grounds that the decision in Oakdene I$_2$ did not support the supposition put to the witness by the Board. In the event that the Board's questions had been based on an incorrect supposition, the Board modified its questioning of the witness and directed its subsequent questions along these lines to quotations read to the witness from the text of the decision in Oakdene I$_2$. The witness answered that any references he had made to the decisions in Oakdene I$_2$ and Oakdene II$_1$ were contained in the Staff Report to Council. In any event, Mr. Butler reiterated his view that Phase 1 and Phase 2 of the Florence Subdivision development are sufficently different that the determination of the intent of the MPS by the Board in the decision in Oakdene II$_1$ has no persuasive effect on the Board's present duty of determining the intent of the MPS as it affects the present application to rezone Phase 2 .

Mr. Murtha intoduced Exhibit F-36 as restrictive covenants which he represented as being copies of covenants applied to certain deeds issued by the Appellant on certain lots which it has sold in Phase 1. Mr. Murtha had previously undertaken to produce copies of these restrictions as registered in the Registry of Deeds at Halifax before the evidentiary portion of this appeal had been completed. Mr. Murtha had tendered these covenants for the limited purpose of attempting to corroborate the evidence of witnesses for the Appellant who had testified that contractual type of development controls were being voluntarily imposed by the developer in Phase 1 and were of the type which would be voluntarily imposed by the developer on the lots contained in Phase 2. Mr. Murtha specifically denied that these covenants were being introduced to try to prove a binding "building scheme" enveloping all the lands contained in Phase 1 and Phase 2.

Mr. Mullen then tried to introduce 7 more letters that he said were signed by inhabitants of the area protesting the proposed rezoning. Mr. Murtha objected to their admission on the grounds that Mr. Mullen had completed his case and that the time for adducing evidence in the hearing had expired and that he would be unable to cross-examine the authors of the letters on the contents of their letters. Mr. Mullen was unable to assure the Board that the lettters contained any novel objections to the rezoning. Mr. Mullen was unable to give any legal excuse why these people had been unable to attend that portion of the hearing set aside to hear from people who wished to testify. Mr. Mullen did not have these letters' authors available before the Board to testify. Since the Board had heard from all people who had attended the hearing until they could, in due course, be heard, since there was no alleged novel objections to the rezoning contained in the letters according to Mr. Mullen, since the authors of the letters had been unwilling to attend the hearing at a time when their evidence would and could have been heard (the Board had been hearing evidence in this appeal for over 6 days), since the authors of the letters had not been made available for cross-examination before the Board on the content of their letters, and since the Board assured Mr. Mullen that it fully understood that the uncontradicted evidence already before it showed none of the inhabitants of the R-1 houses in the vicinity of Phase 1 supported the rezoning of Phase 1 to R-2, the Board would not, at the time these letters were tendered by Mr. Mullen, allow them into evidence.

Having completed a review of the testimony of the witnesses, the Board will detail some of the relevant portions of the documentary evidence tendered to the Board much of it contained in Exhibit F-11.

The application to rezone is contained in Exhibit F-11 and is dated August 18,1987. It states "In the event **advertising costs exceed $500, you will be billed for them, while the costs are less a refund will be made. In the event that the rezoning process is terminated before a public hearing date is set, your deposit will be returned to you." Written across the bottom of the Application Form in ink is "Urban Residential Designation".**

On August 19, 1987, Paul Morgan, a municipal planner acknowledged for the Municipality the application as being then complete as far as the Appellant was concerned but that

numerous "agencies" would be requested to study the application and report for the basis of a Staff Report.

Pursuant to requests from Mr. Morgan the following responded positively to the requests of Mr. Morgan:

1. Halifax County-Bedford District School Board, September 2, 1987.
2. Department of Transportation (roads), September 8,1987.
3. Engineering & Works Department (Municipal), September 2, 1987.
4. Engineering & Works (Municipal), November 5, 1987.

Subsequent to receiving these positive reports, a Staff Report (previously alluded to directed to PAC dated November 9, 1987) was prepared. Some of the operative parts of that report are as follows:

"**RECOMMENDATION**

THAT THE APPLICATION BY FLORENCE DEVELOPMENT LIMITED TO REZONE THE REMAINDER OF LOT AB...FROM R-1...TO R-2...BE REJECTED BY MUNICIPAL COUNCIL

...

Development of the first phase has received considerable attention from the Municipality and the local residents. In 1983, an application was made to rezone the land from R-1 (Single Unit Dwelling) to R-4 (Multi-Unit Dwelling) Zone, to allow for the construction of a 70 unit apartment building. Council rejected the application and the Nova Scotia Municipal Board upheld this decision upon appeal. A subsequent application was received in 1986 to rezone the land from R-1 to R-2 (Two Unit Dwelling) zone. Council again rejected the application, but its decision was overturned by the Municipal Board in an appeal.

...

ANALYSIS

The municipal planning strategy for Sackville designates the property Urban Residential, which supports the existing single unit dwelling environment and give priority to continued development of the same. However, the emerging needs within the community for alternative housing forms are recognized by the plan. Therefore, rezoning for two unit dwellings may be permitted where their scale and location is not inconsistent with existing neighbourhoods and the Municipality is capable of meeting all servicing commitments. ...

Most importantly, the proposal is is not consistent with the plan's intent of preserving the integrity of the surrounding single unit dwelling environment. The site grading plans, approved for tentative plan of proposed roadway will be excavated to the rear property. The anticipated loss of natural cover, combined with differences in ground elevation, will therefore leave any future development of these lands fully exposed to abutting residents on Kaye Street. Grading plans for the first phase of Florence Court[sic] indicate that the natural grade will be maintained across a strip of land along the northern boundary lines, thereby allowing the natural forest cover to be maintained as a buffer between the two unit structures and the established single unit dwellings on Kaye Street.

Furthermore, a majority of the lots proposed have an area and frontage only slightly larger than the minimum required under the Land Use By-law. A development of semi-detached units would therefore appear quite dense to the abutting residents on Kaye Street, presently exposed only to low density single unit subdivisions. The lots in the first phase were generally larger and had a greater depth, particularly on the north side of the street.

Past experiences suggest that the integration of two unit housing developments within the Sackville Community have proven problematic. Part of the problem may be attributed to their rapid growth rate subsequent to the plan's adoption. Since 1982, the relative growth of two unit to single unit dwelling construction within the Sackville plan area has substantially exceeded that of the municipality as a whole. Their increase is even more pronounced within District 16, where this proposal is located. ...

Community resistance to two unit housing appears more severe where their development occurs in established neighbourhoods, particularly where entire subdivisions have been devoted exclusively for them....

The plan does not state what an appropriate mix of housing would be. However, because Florence Place Court is located adjacent to an established R-1 neighbourhood, staff is of the opinion that the second phase should be maintained for single unit dwellings to allow for a more acceptable blend of housing style. ...

...sanitary sewer system...

... the density of Florence Court subdivision, developed entirely with semi-detached units, would be 30 persons per acre. Staff feel that in new subdivisions such as Florence Court [sic], two unit and single unit housing should be mixed to maintain an overall density in closer proximity to the design guidelines. ...

Conclusion

Due to the topography of the site and the loss of forest cover anticipated, development of semi-detached units on the site would not be consistent with the plan's objective of maintaining the integrity of the existing single unit dwelling environment. Construction of single unit dwellings, as presently permitted by right, would be more suitable from the community's perspective and in meeting with the servicing objectives of the Municipality."

This Staff Report came before a PAC meeting of November 30, 1987. The minutes of this meeting contain the following excerpts which have some bearing on the present appeal:

"3.Business arising from the Minutes
a> ...Rezoning Florence Place Court from R-1 to R-2
Counillor Lichter...advised that PAC was desireous of hearing from people who wished to speak. The chairman advised that he was not prepared to hold a mini public hearing and asked the speakers to restrict their comments in support or non-support of a public hearing.

Mr. Clarence Ayers...indicated that he was opposed to any rezoning from R-1...that the area had been rezoned R-1 for a considerable length of time and that the area residents are opposed to rezoning. He also noted that a previous rezoning request had been rejected by Council, however, this decision had been overturned by the Municipal Appeal Board [sic]. Mr. Ayers advised that this appeal had been held during a work day and that only three residents were able to attend. Part of the reason stated for granting the appeal was the fact that those in opposition would not take a day off work to attend. He indicated that logic was very unfair.
...Mr. Ayer [sic]...confirmed that access to Florence Court had been obtained by tearing down a building, something which had not been forseen during the planning process.

Mr. Ayers said that he was disillusioned about arguing the same thing over and over again. ...

Mr. Bruce Hubley, part owner of Florence Place Developments,... indicated he would like to challenge some points to the Staff Report. ...Councillor Lichter stated that since he had not stopped Mr. Ayer [sic], it was only fair to change his position to allow Mr. Hubley to speak....

Mr. Hubley stated that the area in question was really a pocket of land surrounded by R-2 and Commercial zoning. It was his organization's feeling that this rezoning would create a buffer zone between the Commercial and R-1 areas. He stated that R-2 would create a natural buffer and that R-1 next to a commercial zone would be more harmful....

Mr. Hyland asked if Mr. Hubley had been aware of the development plan in Sackville before purchasing the land and if a copy of the plan had been acquired.

Mr. Hubley...indicated that this land had been bought on speculation and that it was their first subdivision development. He confirmed they were in business to make a profit. They were aware of the R-1 zoning, however they purchased the land on speculation, hoping to rezone it to R-2.

Mr. Hubley...was not aware of the previous rezoning rejection and the residents' opposition to rezoning at the time of purchase. Mr. Hubley also stated that any development should compliment [sic] the neighbours. He ... had not contacted the neighbours. ...

Mr. Hyland asked, if rejected, would Mr. Hubley appeal.

Mr. Hubley confirmed...they would appeal because the R-2 zoning would be more appropriate to making a profit as opposed to making a loss.

Councillor MacKay asked if Mr. Kevin Ainslie was part of Mr. Hubley's organization.

Mr. Hubley pointed out that this was an error in the Staff Report. ...Kevin Ainslie is not a shareholder. ... Kevin Ainslie had found the land in question...he does not have a financial interest in their company. ... Kevin Ainslie may have been aware of the residents' opposition to rezoning but...Mr. Hubley...was not aware at the time of purchase.

THAT IT BE RECOMMENDED TO COUNCIL THAT THE Staff Report BE ADOPTED WITH NO PUBLIC HEARING TO BE HELD

Motion carried.

...

THAT THIS RECOMMENDATION BE FORWARDED TO COUNCIL ON A SUPPLEMENTARY REPORT

Motion carried.

Coucillor Deroche stated that he felt the application was premature.

Councillor MacKay stated that Mr. Ayers had put forth the opinion of the residents in the area. Councillor MacKay advised that this area had been rezoned in 1972 without the residents' knowledge and the feeling s of the area residents have come through on numerous occassions.

It was agreed that since Mr. Ayers had been allowed to speak to Committee that the copy of his letter addressed to the Warden be returned to him[emphasis by the Board]."

The report from PAC came before Council December 1, 1987 and was dealt with according to the Council Minutes as follows:

"...Rezoning Florence Place Court form R-1 to R-2
...moved...

> ' THAT the application by Florence Development Limited to rezone the remainder of Lot AB, located off Florence Place Court between Kaye Street and Sackville Drive in Sackville, from R-1...to R-2... be rejected by Municipal Council.'
> MOTION CARRIED."

Completing the review of the docments tendered to the Board, here are some excerpts from the restrictive covenants tendered to the Board by Mr. Murtha as Exhibit F-36:

> "2. No cutting, change, or development shall be made or carried out nearer to the rear line of lands than fifteen...feet. ...
>
> 10. Except with the approval in writing of the Grantor, no living tree shall be cut or removed from the Lands other than those standing within an area to be excavated for building the dwelling. No cutting shall take place within fifteen feet... of the rear line of the Lands. ...
>
> 14. The Grantee shall not permit the condition of the surface of the Lands to fall below the standard of landscaping of neighboring lands."

The Board, while reading the entire MPS, in Schedule B to this decision has extracted those portions of the MPS which seem of some direct pertinence to the appeal at hand and to the arguments made by various persons during the course of the appeal.

Mr. Murtha argued that Phase 1 and Phase 2 were for all intents and purposes identical. He argued that Oakdene I_2 decision of the Board determined that R-4 development of the subdivision was marginally too dense for the area to fit within the intent of the MPS (at least in its "worst case scenario"). He argued that Oakdene II$_1$ determined that the intent of the MPS for the area was to allow R-2 development along Florence Place Court and that the present Board, because of the essential identity of the facts in Oakdene II$_1$ and the present case, was bound to follow its previous decision in Oakdene II$_1$, allow this appeal and order Council to rezone Phase 2 to R-2. He argued that Oakdene I$_2$'s decision would have approved a density of 70 units for Phase 1 and therefore, by analogy, would have allowed 70 units for Phase 2 were a development agreement approach available to, and used by, Council. According to Mr. Murtha, the present rezoning will only allow for the population density which flows from 28 units so that the density restrictions implict in the words of Oakdene I$_2$ are not exceeded by the densities which will result from the residential development of Phase 2 as R-2. Mr. Murtha notes that the turning circle at the far end of Florence Place Court marks the practical end of conversion of R-1 zoned land to R-2 zoning in this particular area of the plan. Mr. Murtha argues that the development proposed fully meets the intent of the MPS and that the decision of Council, based on considerations not founded on the intent of the MPS, is therefore contrary to the intent of the MPS. In such a case, according to Mr.

Murtha, the Board must allow the appeal and order Council to rezone Phase 2 as requested by the Appellant.

As an ancillary matter, Mr. Murtha argued that, since the decision of Council turned down the Appellant's rezoning application without a hearing, the Municipality ought to have returned the Appellant's $500.00 deposit for advertising. Given the result of this decision, the Board refrained from any attempt to determine this argument in this decision.

Mr. Mullen argued that the facts of Oakdene II_1 were different than the facts of the present appeal. He further said that the decision in Oakdene II_1 was wrong and he opposed that decision equally with the present appeal. Mr. Mullen argued that the citizen resistance to the rezoning ought to be a determinant in the Board's decision and that the appeal of the Appellant should be dismissed and the decision of the Council confirmed.

Mr. Cragg argued that the Board in Oakdene II_1 was wrong when it said it followed the reasoning in Oakdene I_2 to arrive at its result. He argued that Oakdene I_2, properly understood, was the appropriate precedent establishing principles to be followed by the Board in deciding this appeal. From Oakdene I_2, Mr Cragg extracted the following principles which he argued should guide the Board in its deliberations herein:

p5

" The sole issue in this appeal is whether or not the decision of Council reasonably carries out the intent of the [p6] Municipal Planning Strategy. The Board, in coming to a decision on this issue, is limited by Section 63(5) of the Planning Act which states:

> **'63(5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy.'**

...

[p23] In the opinion of the Board, Council must judge each application for rezoning in the light of the policies of the MPS, using the expert opinion of its planning staff and the input from the public at the public hearing to ensure that the criteria set out in the MPS are met....

This is an infilling situation for which there appears to be no specific policies in the MPS under the Urban Residential Designation section...[p24] the policy guidance in the MPS relevant to this rezoning application occurs in...P-29, P-30, P31, P-54...together with P-104 which sets out the general criteria for amendments to the Land-use By-law....

[p25] Policy P-31 specifically states that 'Council may consider amendments...to permit...multiple unit dwellings'...In the opinion of the Board, this does not imply that it is mandatory that Council approve such amendments, but only that Council may consider them, providing they meet the criteria set out in Policy P-31 and P-104.

...[p28] Council may legitimately refuse to rezone the subject lands because of concerns raised by area residents which indicate that the proposed development does not meet the intent of the MPS"

Mr. Cragg said the above statements convey the appropriate tests as should be applied to the appeal by the Board in this case. According to Mr. Cragg, Council had a discretion. Council exercised that discretion in a reasonable manner and that exercise of its discretion can be reasonably said to be within the intent of the MPS and, therefore, this appeal should be dismissed.

Mr Cragg, as an alternative argument (only to be used if his first argument fails), suggested that if the Board decided otherwise (in the light of its decision in Oakdene II_1) it could and should split the application and allow R-2 rezoning of only the downhill side of Phase 2.

Mr. Mullen in his argument emphasized what one may term "citizen " resistance to the proposed rezoning. The Board accepts as a fact that the "citizen" resistance to this rezoning was, on the evidence before the Board, universal when "citizen" was defined as a person occupying one of the single family homes on the neighbouring streets. Mr. Mullen's argument begs the question of whether the undoubted opposition of the persons living in single family dwellings on Kaye and other streets in the neighbourhood was founded on reasons supported by the MPS or not.

Mr. Hyland, in giving his evidence, furthered the argument made by Mr. Mullen when he stated that Oakdene II_1 was wrongly decided. When he attacked Oakdene II_1 Mr. Hyland cited from the General Commercial Designation section of the MPS starting at p48 thereof (See Schedule B hereto) and particularly P-59, P-60, P-61, P-62. Mr. Hyland said that this area of the MPS supported his argument that development of the subject area could occur under the MPS only from Sackville Drive and not from Florence Street.

With respect, the Board disagrees with Mr. Hyland. The Board agrees that commercial development of the subject lands may only be contemplated, in the context of the present MPS, from Sackville Drive to within 100 feet of Kaye Street. That, in the view of the Board, is much different than saying the MPS contemplates residential development of the subject land from Sackville Drive. Mr. Hyland"s interpretation of the MPS (which is the logical basis in support of his contention that the decision in Oakdene II_1 was wrong) is, in the view of the Board, for the reasons just stated above, incorrect. Thus Mr. Hyland's position that the decision in Oakdene II_1 is wrong cannot be supported-at least for the reasons stated by Mr. Hyland.

Mr. Mullen and Mr. Hyland in the course of their conduct as appears from the written record of the prehearing proceedings and from the hearing's viva voce evidence treated Phase 1 and Phase 2 as merely part of the same transaction. The Board believes that Mr. Hyland conceded that for his position against the rezoning to succeed the Board had to declare the decision in Oakdene II_1 wrong.

Mr Cragg was (and probably still is) convinced that the decision in Oakdene II_1 was wrong. He felt, furthermore, that there was a great difficulty in finding any real legally significant distinction on the facts between this appeal and Oakdene II_1. He felt that the principles he derived from a proper reading of Oakdene I_2 (extracted above) were the proper principles to be applied in this appeal, and if so applied, would lead to the conclusion that the decision of Council was reasonably within the intent of the MPS.

On its face *Oakdene II*[1] purports to follow the reasoning in *Oakdene I*[2]. Some of the relationship between these two cases was dealt with in ***W.R. Benjamin Products Limited v. The Director of Assessment*** N.S.M.B.-154-87-A (unreported)[4] starting at p27 and culminating on p28 in its comments on the Oakdenes:

> " In this case, although the Board arrived at opposite results based on a difference in facts of the two appeals, the Board in the second case followed the 'reasoning' outlined in the first of the two appeals."

The Board in this appeal is of the opinion that *Benjamin*[4] correctly, in the above quotation, summarizes the relationship in principles between the two Oakdene decisions. Thus the Board is of the opinion that the principles enunciated in *Oakdene I*[2], cited with approval by Mr. Cragg in his arguments herein, were incorporated by reference into the decision of *Oakdene II*[1]. In short, in respectful disagreement with Mr. Cragg, the Board says that the decisions in the Oakdenes agree in the principles cited by Mr. Cragg and give the same legal guidance on those principles.

Mr. Cragg argued that the decision in *Oakdene I*[2] only gave guidance for those principles cited above. The Board has carefully gone over the decision in *Oakdene I*[2] and says that decision is support for an interpretation of the intent of the MPS which favoured a residential development of 70 units on the lands dealt with in that appeal (basically the Phase 1 lands) but would not support a "worst case scenario" of 132 residential dwelling units on the Phase 1 lands. These quotations from that decision, in the view of the Board, support this position:

> [p2 Headnote] " The mechanism of a development agreement would be an appropriate way to deal with the subject lands if provision was made for this.
> ...
> [p25]...the Appellant has no obligation to follow the specifics of his current proposal for the subject lands if they were to be rezoned, but only to meet the minimum required by the land use by-law. ...
> a 4.6 acre lot would accommodate 132 units rather than the 70 proposed by the Appellant. If the maximum allowable 132 units were built on the subject lands, the 'adequacy of separation distance from low density residential[p26] developments' might not be satisfactory.
> ...
> [p29] The Board has sympathy for the concerns of the existing area residents which appear to have influenced Council in its decision to refuse the requested rezoning. The Board also has sympathy with the appellant whose development has addressed many of those concerns in a responsible way. In the opinion of the Board, the mechanism of a development agreement would be appropriate for the lands which are the subject of the appeal, to accommodate the development of a sizeable interior parcel of serviced land surrounded by existing residential and commercial development.[emphasis by the Board] ...
> [p30] In considering whether the Board should choose to 'allow the appeal by instructing the Council to amend the by-law in the manner prescribed by the Board', that is, in effect by creating a special zone[p31] for the subject lands...concluded that a Land-use By-law which resulted from widespread public involvement and careful consideration before its adoption only two years previous of the appeal should not be altered in this instance. The Board, however, recommends that Council consider policies allowing development agreements in residential infilling situations such as the one presented in this appeal in the 5-year review of the MPS required by the Planning Act."

In the view of the Board these quotations show that the Board in Oakdene I$_2$ was looking for almost any legal way to encourage a R-4 development to the extent of the 70 residential units on the Phase 1 site. It was prepared to consider designing a specific new R-4 type of zone for the area and only rejected that alternative with regret. It was prepared to entertain, as falling within the intent of the MPS, density to 70 units on Phase 1 if a development agreement process had been available to control development to that density. It recommended that Council bring in development agreement policies which would enable developments such as Phase 1 to accommodate the proposed density in R-4-like construction. The Board believes the Board in Oakdene I$_2$, while turning down R-4 development of the "worst case", favoured the underlying impetus to development expressed in the MPS (see Schedule B), and found that, as to density, 70 residential units would be appropriate for Phase 1 and otherwise in accord with the MPS.

Oakdene II$_1$ does not argue with that finding (some persons might try to say dicta) of Oakdene I$_2$ but merely seems to say that if the density, traffic considerations, and other concerns of a planning nature of a 70 unit R-4 type of development for Phase 1 are within the intent of the MPS then a R-2 development within the same site allowing for approxmately 24 units in a R-2 development would surely also be within the intent of the MPS.

The Board views as axiomatic, or accepted by most persons, that the potential land use conflicts between an R-1 developed zone and an abutting R-4 developed zone are of a much greater order of magnitude than the potential land use conflicts between an R-2 developed zone and an R-1 developed zone, other things being equal. In the Phase 1 situation, given that the R-4 and the R-2 were proposed to be put on the same site, the Board of Oakdene II$_1$ obviously found that the R-2 zone proposed met the development imperative contained in the MPS while accepting the minimal land use conflict between adjacent R-1 and R-2 development to be well within the parameters spelled out as acceptable in Oakdene I$_2$.

In short, after the above review, the Board is unable to accept Mr. Cragg's contention that Oakdene I$_2$ and Oakdene II$_1$ are decisions in conflict and that the earlier of the two decisions Oakdene I$_2$ should provide the guidance for the decision to be arrived at in this appeal. In the view of the Board, the decision in Oakdene II$_1$ dutifully follows the guidance provided it by the decision in Oakdene I$_2$ and properly applies that guidance to its duty of determining whether or not the refusal to rezone Phase 1 to R-2 was reasonably within the intent of the MPS.

The Board in Oakdene II_1 decided the decision of Council was not within the intent of the MPS and consequently ordered Council to rezone all but one lot of Phase 1 to R-2.

The Municipality's planning staff, according to their Staff Report, would have the Board distinguish this appeal (because of the differences of the facts which apply to Phase 1, the subject of the two Oakdenes, and the facts which apply to Phase 2, the subject of this appeal) from Oakdene II_1 and arrive at a result supporting the decision of Council. There are differences in the facts between Phase 1 and Phase 2 which have been noted in the excerpts from the evidence included in this decision. The Board is of the opinion that those differences in facts are differences in detail insuffiicent to encourage the Board to distinguish the case of Oakdene II_1 from the case under appeal.

At this point, if Mr. Murtha's argument were totally correct, the Board, according to Mr. Murtha, would have no choice but to follow Oakdene II_1 and to allow his client's appeal.

Mr Murtha's arguments raise the question of what extent, if any, the Board has a duty to follow previous Board decisions. This issue was raised and dealt with by the Board in $Benjamin_4$, cited above for other purposes. The Board will not repeat the reasoning used in $Benjamin_4$

concerning this question, but adopts the conclusions as to Board precedents arrived at in that case as its own for the purposes of this appeal. Benjamin[4] took guidance from the decision of Macdonald J.A. in the unreported single judge Appeal Court Chambers decision of The Town of Bedford v. Armoyan Group Limited (unreported) S.C.A.# 01908[5]. Mr. Justice Macdonald's decision, Armoyan [5], was favourably mentioned by the appeal court panel consisting of Pace, Hart and Jones JJ. A. in The Town of Kentville v. Laba (unreported) S.C.A. No. 01717[6]. A sub-sub-sub quotation starting at p6 of Laba[6] sets the test that the Board should use in dealing with the persuasiveness of previous Board decisions on the case at hand:

> "Although the Board may enunciate general principles as guides for future cases it must not ' fetter its [p7] hands and fail, because a guide has been declared, to give the fullest hearing and consideration to the whole of the problem before it."

Mr. Murtha's argument thus must fail, at least to the extent that it proposes the close precedent of Oakdene II[1] as a final determinant for the decision to be granted in this appeal. The Board must not so fetter its hands but must, having all due regard for and using previous decisions as guides, give the fullest hearing and consideration to the whole of the problem before it.

Starting at p581 of the decision in Oakdene II[1] there is a comparison in the facts of the two Oakdenes. Without quoting again that comparison, the Board will follow the format of the comparison set out there and compare the present appeal with the two Oakdenes at least to see if the present appeal is distinguishable from Oakdene II$_1$ on its facts using the following paraphrase:

> 'The decision in Oakdene I$_2$ sets out quite well the technique to be used by the Board to determine the intent of the MPS. The lands are very similar to the lands in Phase 1 and the developer has a very similar objective as had the developer in Oakdene II$_1$. The appeals are quite close in time. Council, in effect, refused all three rezonings. In every case the developer appealed. The density on a dwelling unit per lot basis is the same in this appeal as in Oakdene II$_1$ (both asked for R-2). The main difference seems to be in the advice Council received from the planners in rezonings in Oakdene I$_2$ and Oakdene II$_1$ and the advice Council received from the planners in the present appeal.'

Certain factual conclusions made by the Board previously mentioned above are numerically summarized below:

1. Phase 1 and 2 are so closely alike that no meaningful distinctions in fact may be made between them;
2. R-4 development is too dense for the area when built to its maximum permissable density;
3. R-4 to the extent of 70 units for one Phase (approximately 140 units for both phases) would be likely suitable for the site and aggreeable to the density requirements of good planning for the site;
4. R-2 development for Phase 1 was quite appropriate according to the Board;
5. Council was consistent in opposing rezoning throughout;
6. Planners, including the responsible municipal planners, had supported at least modified R-4 for Phase 1, and when that was not granted, full R-2 for Phase 1;
7. The local R-1 resident inhabitants were consistently against the rezoning of Phase 1 and Phase 2 throughout;
8. The MPS was essentially the same throughout.

Given these conclusions of the Board drawn from the evidence adduced before it, the nub of this appeal is the answer to the question "Why did the responsible municipal planners accept densities higher than R-1 in Phase 1 and refuse to accept the higher densities flowing from R-2 in Phase 2 ?"

The responsible municipal planners said it was the physical differences in the sites of the two phases. The Municipality's planning staff, according to their Staff Report, would have the Board distinguish this appeal concerning the differences of the facts which apply to Phase 1, the subject of the two Oakdenes and the facts which apply to Phase 2, the subject of this appeal, from the decision in Oakdene II_1 and arrive at a result supporting the decision of Council. There are differences in the facts between Phase 1 and Phase 2 which have been noted in the excerpts from the evidence included in this decision. The Board has already stated the opinion that those differences in facts are differences in detail insuffícent to encourage the Board to distinguish the case of Oakdene II_1 from the case under appeal.

The responsible municipal planners said the that the persons who live in the single family residences oppose the rezoning. The Board in all three cases respecting development along Florence Place Court has been sensitive to the opposition of these inhabitants to any rezoning. In Oakdene II_1, the Board responded to this opposition in an appropriate way when it protected the streetscape of Florence Street by refusing to rezone the one lot that fronted on Florence Street to R-2 thus leaving that lot to be built on by a single family house as were many of the surrounding houses fronting on Florence Street. No duplexes amongst the existing singles. In the present appeal the Appellant had, as part of its contiguous landholding, a vacant lot fronting upon Kaye Street which at that point had a single family house on either side and also across the street from it. The Appellant excluded that lot from his application to rezone the rest of its contiguous land thus making the appropriate separation between R-1 and R-2 development prior thus avoiding any intervention by the Board to achieve this result as had been found necessary in Oakdene II_1. The Appellant, by this action, had protected the streetscape of Kaye Street from an unwarrantible intrusion of an R-2 development into an existing R-1 neighbourhood.

The planners, as did the above mentioned single family inhabitants, made much of the lack of buffering by tree loss when construction commenced between the R-1 on Kaye Street and the proposed R-2 construction on the high side of Florence Place Court. They made no mention of the buffering effect of the pronounced grade differentials between the Kaye Street lots and the lots on the upper side of Florence Place Court. The Board in Oakdene I_2 had clearly spelled out at pp28 and 29 of that decision the positive buffering effects of the grade differentials at least in respect to

Phase 1. The slopes down from the Kaye Street lot levels in Phase 2 seem to be at least as steep as the comparable slopes in Phase 1, falling the same distance in a shorter length. The planners, in their report, seem not to take into account (or deal with-in any significant way) what effect this Board-recognized form of buffering would have, if any, on the conflict level between the R-1 land uses fronting on Kaye Street and the proposed R-2 land uses fronting on the upper side of Florence Place Court.

The complaints of the inhabitants as to tree buffering seems to the Board to be a comparison between the buffering in Phase 2 as it exists now (untouched except for the cutting out of the center road allowance centered in the subdivision) and the Kaye Street development as it now exists and as it would be if the subject land were developed to R-2 as proposed. They seem to have assumed that the trees would remain in place so long as the R-2 zoning was never allowed. Economics of development may make that position a factually correct position for the reasonably foreseeable future. R-1 as-of-right development of Phase 2 may not proceed, because of the economics involved, for a long period of time. Thus the inhabitants would be comparing the non-development and non-tree cutting on the site of Phase 2 with the additional cutting that will necessarily accompany the proposed R-2 development of Phase 2. If such a comparison is supported by the intention of the MPS, then there is an obvious derogation of the accustomed enjoyment of certain abutting lots to Phase 2 which front on Kaye Street. In the view of the Board that is not the comparison that the inhabitants are entitled to make and to have enforced within the context of the MPS. They must compare, if they wish to sustain their positions within the context of the MPS, the tree clearing that would logically result from as-of-right R-1 development of Phase 2 and its proposed development as R-2. There would be no appreciable legally sanctioned differences between the tree clearing done in each case. Without any land development for housing at all the landowner, as a matter of law, might denude Phase 2 of all tree cover tomorrow and the inhabitatants of Kaye Street would have no immediate legal recourse against it for such action. The consideration of tree buffering, when considered in such a light, does determinatively dispose of the inhabitants concern for lack of tree buffering between the existing R-1 land uses and the proposed R-2 land uses. The distress of the inhabitants as to tree buffering is not a proper guideline at this stage of the total development of Florence Place Court to permit the Planners to change their advice as to the increase of density engendered by the development of R-1 housing in Phase 2.

(The inhabitants may stand their best chance of retaining any tree buffering between development on the lots on the upper side of Florence Place Court from the developer's promise to impose the restrictive covenants on its proposed development.)

Had the Municipality seriously wished to support the views of the inhabitants it had the option to acquire the lands, by acquisition-negotiated or otherwise-, and then set aside the land for park use.

The municipal planners when considering Phase 2 seemed, in their report, to give extreme weight to the wishes of the inhabitants who opposed the rezoning . The opposition of the inhabitants to rezoning remained constant throughout the three applications to rezone that dealt with Phase 1 and Phase 2 and was expressed to be for the same reasons. The municipal planners discounted that opposition in their advice concerning the two prior applications which concerned Phase 1. There are no planning reasons made apparent, satisfactory to the Board, to explain that change of emphasis on the part of the municipal planners in the advice they gave to Council about Phase 2.

The municipal planners mentioned the Oakdenes in the current Staff Report. They came up with no fresh insights derived from a careful reading of the MPS to show to this Board that it it had been wrong in determining the intent of the MPS in either or both of those cases and that it should (in the almost theological words of the case of Re Board of Directors of Lethbridge Northern Irrigation District and Canadian Union of Public Employees Local 70 38 D.L.R. (3d)

121_7) "repent and recant" on its previous determination of the intent of the MPS.

The municipal planners could not show that there was some specific guidance in the MPS to allow the Council in this appeal to determine its action was within the intent of the MPS, and was in no way affected by the guidance as to the intent of the MPS laid down in the two Oakdenes as that guidance applied to Phase 1 and concerned Phase 2.

In their Staff Report the municipal planners were unable, or at least did not, prepare a critique of the decisions of the two Oakdenes sufficent to guide Council as to the probable effect those decisions might have on Council's deliberations on this zoning appeal. In dealing with rezoning applications, Council must consider rezonings only "in accordance with Policies contained in the planning strategy...[and] to carry out the intent of a municipal planning strategy."[emphasis by the Board; see S. 51 (1A) (2) of the Planning Act.]. Council is more likely to carry out that duty correctly and properly to decide questions concerning land use by-law amendments when it is fully advised by the planning staff (ideally through the medium of Staff Reports) of the appropriate policies to be applied and, as well, whether the rezoning being proposed before it carrries out the intent of the MPS.

In the view of the Board, the Staff Report was silent as to the policies that Council should follow in arriving at its decision in this matter. It contained, in the view of the Board, insuffıcent treatment as to the intent of the MPS as it applied to the application before Council. It did not properly deal with, for the edification of Council, the lessons of the decisions of the two Oakdenes relevant to the application then before them. In the view of the Board, stated already above, planning staff erred in distiguishing on a factual basis the guidance principles contained in *Oakdene II*[1] concerning , principally, allowable density and relevant intent of the MPS. Planning staff (or any other persons testifying before the Board in this appeal) did not, in evidence, show that they had repaired these failures the Board has found in their written report to Council prior to Council making its decision on the application here under appeal.

It is clear that Council was ill advised by its planning staff as to the appropriate *Policies* that Council needed to consider to support its decision making process in the application before it. Council was also not correctly informed by its planning staff as to the *intent* of the MPS. Whatever was the basis of the Staff Report, it was not based on the *policies* , or in a broader sense, the *intent* of the MPS according to its text and according to the viva voce evidence given to the Board in this appeal.

There is evidence before the Board which shows that the intent and the policies of the MPS were not brought before the Council in a time, properly, to inform Council of its duties by someone other than Staff. Council adopted its planning staff's recommendations as contained in their Staff Report.

At the hearing before the Board the Appellant called Donald Mason, an experienced planner, who agreed with the planners' opinions given in Oakdene II[1] and was unable to understand how the reponsible municipal planners' advice was able to change in relation to Phase 2. He expressed the firm opinion that that the proposed development herein was fully in accord with the intent of the MPS, that the decision of Council was contrary to the intent of the MPS and could not reasonably be found to fall within the intent of the MPS.

In this appeal the Board prefers the conclusions of the expert opinion of Mr. Mason to the contrary conclusions of the expert opinion of Mr. Butler for the reasons that must be apparent from the preceeding portions of this decision.

On this appeal the Board must adhere to the powers set out for it under the **Planning Act** and must consider the effect of all its provisions. It brings attention more particularly to the following portions thereof:

> "51 (1A) A council...may subsequently amend a land-use by-law in accordance with policies contained in the planning strategy.

(2) A council shall not adopt or amend a land-use by-law except to carry out the intent of a municipal planning strategy.

63(1)...the refusal by a council to amend or revise the land-use by-law pursuant to subsection 1(A) of Section 51 may be appealed by
...
(b) the applicant;
...
(3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy.

(4) The Board may
(a) confirm the decision of council;
(b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law; or
(c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board.
(5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy.
...
(7) Notwithstanding subsections (5) and (6), the Board may allow an appeal by an applicant if, in the opinion of the Board,
(a) the applicant would suffer undue hardship; or
(b) extraordinary or compelling circumstances are present."

There has been no evidence tendered of undue hardship to the Appellant and there is no evidence of extraordinary or compelling circumstances so the appeal cannot succeed because of s.s. 7(a) or (b) of Section 63 of the Planning Act.

The Board has viewed the site, listened to all the evidence and argument, and perused the exhibits before it.

For the reasons stated above, the Board is satisfied that the refusal decision of Council does not reasonably carry out the intent of the MPS (Section 63 (3) of the Planning Act) and, with full regard to Section 63(5) of the Planning Act, finds itself impelled pursuant to Section 63 (4) (c) of that statute to allow the appeal herein by instructing the Council to amend the land use by-law in such a manner as to grant the Appellant the R-2 zoning it applied for.

An order will issue accordingly.

DATED AT HALIFAX, Nova Scotia this 8th day of June, 1988.

RICHARD L. WELDON

MEMBER

SCHEDULE A

1 Oakdene Estates Limited v. County of Halifax (1986) 5-B M.B.D. 571

2 Oakdene Estates Limited v. County of Halifax (1985) 4-B M.B.D. 1

3 Benedict v. Town of Truro (1985) 4-B M.B.D. 291

4 W.R. Benjamin Products Limited v. The Director of Assessment N.S.M.B.-154-87-A (unreported)

5 The Town of Bedford v. Armoyan Group LimitedS.C.A.# 01908

6 The Town of Kentville v. Laba S.C.A. No. 01717 (unreported)

7 Re Board of Directors of Lethbridge Northern Irrigation District and Canadian Union of Public Employees Local 70 38 D.L.R. (3d) 121

SCHEDULE B

EXCERPTS FROM MPS FOR SACKVILLE

"[PI]**INTRODUCTION**

... The purpose of the Plan is to guide the decisions of Council in the regulation of physical development and provision of public services and facilities within the Sackville Plan area of the Municipality of the County of Halifax. ...

[p3] **REGIONAL CONTEXT**

...Sackville is a suburban community located in the northern sector of the Halifax-Dartmouth metropolitan area. ... The community has a population of approximately 20,000 within the metropolitan total of 285,000.... The provision of municipal central sewer and water facilities and the accompanying land banking and development conducted by the Nova Scotia Housing Commission were the major factors which permitted the development of Sackville as a suburban center. ...

[p10]**Community Identity**

...As its population stabilizes, residents are becoming more concerned about the future and are developing a strong community identity....

[p12]**ENVIRONMENTAL HEALTH SERVICES**

Water is provided... from the Pockwock Lake water supply...

Sanitary sewers are also connected with Bedford... and eventually connects ... to the Mill Cove treatment plant which empties treated effluent into Bedford Basin. ...Piped storm drainage facilities are limited....[p13]

The Regional Sewerage, Drainage and Water Supply Plan... has stated that the maximum population which can be serviced by existing...systems...is 153,000...municipal services can accommodate... an additional 81,200 residents... .

[p 14] That portion of the Sackville Plan Area which is now serviced by a central sanitary sewer has a population of between 18,000 to 20,000 at a density approaching nine persons per acre. The Regional Sewerage, Water Supply and Drainage Plan states that the total [p15] serviceable area within Sackville consists of approximately 4,770 acres of which 2,840 are yet to be developed. These undeveloped lands could conceivably accommodate a population of approximately 45,000 on central services if the design capacity of 16-18 persons [per acre] can be obtained. If this maximum density can be achieved, Sackville's population could ultimately reach 63,000....

It is important to recognize that development in Sackville and subsequent related capital investment has occured as a direct result of decisions which designated the community for urban development based on a defined serviceable area. It shall be a policy of this plan to maintain the integrity of the serviceable area concept.

The main thrust of the plan will be to continue development in areas where servicing presently exists and to encourage the extension of trunk lines to those portions of the serviceable area which do not yet have these services....

[p16] P-2 It shall be the intention of Council that within serviceable areas, development shall only proceed on municipal water and sewer services... .

P-3 ... Where such services are extended for the purposes of residential development, no amendment of the Service Boundary of this Plan shall be required. ...

[p17] P-6 It shall be the intention of Council to investigate, and if it deems necessary, carry out an inflow/infiltration reduction program for the municipal sewerage system in Sackville...

[p20] The Municipality's Sewer Connection By-law is neither sufficent...nor has it been strictly enforced. Coupled with a lack of storm drainage policy, this has resulted in roof and foundation drains being connected to sanitary sewers and to the current inflow/infiltration problem. ...

[p27]**LAND USE INTENT**

...

The intention of the **Urban Residential Designation** is to protect the residential environment of the community while

allowing for a variety of housing types and other uses which are compatible with continuing residential development.

Within this designation, single unit dwellings...shall be permitted. Recognizing that other forms of higher density residential development...may be accommodated without general conflict it is the intention of the Plan to provide for such uses in the Urban Residential designation by amendment to the zoning by-law....

[p30]URBAN RESIDENTIAL DESIGNATION

...

The Urban Residential Designation is designed to recognize the importance of the single unit environment...and yet acknowledge the need for higher density reidential ... development. The demand for multiple unit dwellings will continue to increase in response to the diversified housing needs of the general population. ...

P-29 Within the Urban Residential Designation...it shall be the intention of Council to support the existing single unit residential development..., and to provide for a variety of housing in future development.

[p31] P-30 Within the Urban Residential Designation it shall be the intention of Council to establish a residential zone which gives priority to single unit dwellings and to most community facilities. ...

P-31 Notwithstanding Policy P-30, within the Urban Residential Designation, Council may consider permitting low density residential developments which are of a scale and location not inconsistent with existing neighbourhoods. In this regard, two unit dwellings may be permitted by amendment to the zoning by-law. In considering such amendments Council shall have regard to the provisions of Policy P-104. ...

[P41] With the adoption of this Municipal Development Plan the Municipality will no longer be able to utilize the Planned Unit development By-law....

[p44]... the objectives of the plan are: to introduce the concept of a commercial core; to recognize the inevitability of strip development and to set the standards to create a viable commercial corridor; to provide appropriate locations for heavy commercial development through commercial and industrial policies....

[p45(b)] P-54(a)...Council intends that the residential zone not be extended to include frontage along Highway No.1....

[p46] P-56 Notwithstanding Policy P-55, where properties within the Commecial Core Designation abut the Urban Residential Designation, Council may permit commercial uses [by agreement]...

[p48] General Commercial Designation

...

It is recognized that the commercial lands outside the core area , both developed and undeveloped, must be accommodated without substantially detracting from the development of a community core and causing undue hardships to abutting residential properties. In order to accomplish this the Plan policies shall limit the office space and height component of developments in the General Commercial Designation, shall provide for contractual development for uses adjacent to certain residential neighbourhoods and shall permit existing residential development....

[p49] Continued commercial expansion to the northeast side of Highway No. 1 between Florence Street and the Cobequid Road has resulted in gradual intrusion into neighbouring residential areas.

Although conflicts between commercial and residential methods will not disappear with this Plan, the use of contractual methods will ensure that new commercial and retail facilities will conveniently serve all community residents and protect abutting residential neighbourhoods.

P-61 With reference to Policy P-60 Council shall not entertain an extension of the general business zone on the northeast side of Highway No. 1 between the Cobequid Road and Florence Street.

P-62 Notwithstanding Policy P-61, Council may consider permitting new commercial uses or the expansion of existing uses according to the provisions of Sections 55, 66 and 67 of the Planning Act on properties fronting on or partially within two hundred...feet of the northeast side of Highway No. 1, between the Cobequid Road and Florence Street, provided that no commercial use shall be located within one hundred...feet of Kaye Street, Hillcrest Street and Hillcrest Avenue.

...

[p68] IMPLEMENTATION

...Council cannot take any action within the scope of this plan which would, in any manner, be inconsistent with the plan or at variance with it. ...

P-96 This Municipal Development Plan shall be implemented by means of powers conferred upon Council by the Planning Act, the Municipal Act and such other provincial statutes as may be applicable.

P-98 It shall be the intention of Council to require amendments to the policies and maps in this Municipal Development Plan under the following circumstances:

(i) where any policy is to be changed; or
(ii) where a request for a zoning amendment which is not permitted is made and subsequent studies show that the policies of the Plan should be amended;

Further Council may consider amendments where policies of future plan areas may conflict with the policies of this Plan.

...

[p70] P-100 In accordance with Section 20 of the Planning Act, this plan may be reviewed when the Minister of Municipal Affairs or Council deems it necessary but in any case not later than five years from the date of its coming into force or the date of its last review.

...

[P71] It is not intended that all land shall be prezoned for specific uses. Rather, in order to give Council a greater degree of control, the Plan provides that certain land uses shall be considered only by amendment to the zoning by-law... . Such amendments...shall be granted only if they meet the policies found within this Municipal Development Plan.

The following uses shall only be considered by amendment to the zoning by-law and:

(i) within the Urban Residential Designation:

(a) Two unit dwellings according to Policy P-31;

...

[p73] (d) general commercial uses located on the northeast side of Highway No.1, between Cobequid Road and Florence Street according to Policy-62; ...

[p74] P-104 In considering amendments to the zoning by-law...in addition to all other criteria as set out in various policies of this Plan, Council shall have appropriate regard to the following matters:

(i) that the proposal is in conformity with the intent of this Plan and the requirements of all other municipal by-laws and regulations;

(ii) that the proposal is not premature or inappropriate by reason of:

a) the financial capability of the Municipality to absorb any costs relating to the development;

b) the adequacy of sewer and water services;

c) the adequacy or proximity of school, recreation and other community facilities;

d) the adequacy of road networks leading or adjacent to, or within the development; and

e) the potential for damage to or destruction of designated historic buildings and sites.

[p75](iii) that controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of:

a) type of use;

b) height, bulk and lot coverage of any proposed building;

c) traffic generation, access to and egress from the site, and parking;

d) open storage;

e) signs; and

f) any other relevant matter of planning concern.

(iv) that the proposed site is suitable in terms of steepness of grades, soil and geological conditions, locations of watercourses, potable water supplies, marshes or bogs and susceptibility to flooding.

P-105 In considering amendments to the zoning by-law...Council shall hold a public hearing according to the provisions of Section 36 of the Planning Act.[as it then existed]

[p76] P-109 It shall be the intention of Council to provide further controls over development within the Plan Area by fully enforcing the following by-laws, and by reviewing their adequacy and making amendments where appropriate:

(i) the Building By-law;

(ii) the Unsightly Premises By-law;

(iii) the Topsoil Bylaw[sic];

(iv) the Excavation Bylaw;

...

(vii) the Sewer Connection By-law; and

(viii) the Occupancy Permit By-law.

COLLINS v. CITY OF HALIFAX

PLANNING - L.U.B. AMENDMENT - DOWN ZONING R-2 TO R-1 - BOTH DECISION TO REZONE AND NOT TO REZONE CONSISTENT WITH INTENT OF M.P.S. - AGGRIEVED PERSON - MUNICIPAL BOARD ACT SS. 16(1); PLANNING ACT SS. 2(c); 51(1A); 51(2); 60; 63(1)(a); 63(1A)(a)(i)(ii); 63(3); 63(4); 63(5); CITY OF HALIFAX M.P.S. POLICIES 1.1; 2.4.2; 2.5; 2.5.5; 3.7.1; 4; 4.1; 12.4; 12.5; 12.6; - L.U.B. 12.

Residents of Union Street in Peninsula North Halifax, successfully petitioned Council to down-zone their street from R-2 to R-1 to prevent further conversion of existing dwellings from Single Family to Duplex or even four units. City Planning Staff extended the area to be rezoned, to take in similar blocks in the general neighbourhood of Union Street. The bulk of the area to be rezoned was in a "hard area" of Peninsula North Halifax. Some small portion was in a "soft area". The Appellant C, owner of a duplex on Union Street, appealed as an aggrieved person saying his duplex would become a non-conforming use. He argued that the intent of the M.P.S. was to promote stability in the area by encouraging the continuing gradual conversion to higher density of the R-2 areas located in Peninsula North.

HELD: The Board dismissed the appeal and confirmed the decision of Council.

This application is different from many rezoning applications before the Board in that no developer is involved with a specific scheme threatening to affect a given neighbourhood.

Under Section 51(1)(a) of the **Planning Act** Council might, on its own motion, "subsequently amend" an L.U.B. In this case it did so. The Board held there was no applicant for the rezoning.

The Board is satisfied Council made its decision in a calm atmosphere without undue partisan excitement and it was not under the threat of precise developmental intrusion into the neighbourhood.

A decision to rezone was consistent with the intent of the M.P.S. A decision not to rezone was also consistent with the intent of the M.P.S. Council followed the first option. In such a case it is not the function of the Board to second guess Council. It is prohibited from interfering with the decision of Council in such a situation.

NSMB-5-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, Statutes of Nova Scotia, 1983, as amended;

- and -

IN THE MATTER OF: An Appeal to the Nova Scotia Municipal Board by **NORVAL H. COLLINS,** from a decision of the Council of the City of Halifax made January 14, 1988, which rezoned Needham Street and parts of Union, Albert, Young and Kaye Streets within the City of Halifax from General Residential (R-2) Zone to Single Family (R-1) Zone.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: NORVAL H. COLLINS, appearing on his own behalf;

BARRY ALLEN, LL.B., and ALLISON BROWN, Articled Clerk, on behalf of the City of Halifax.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981, the Municipal Board Act, the Chairman assigned Board Member, RICHARD L. WELDON, to hear this planning appeal at the Board's April 13, 1988, sittings held at the World Trade and Convention Centre, Argyle Street, Halifax, Nova Scotia. (The City of Halifax is hereinafter referred to as the "City"). The hearing went on for three days and, due to space considerations the third day of the hearing was held at the Barrington Inn, Barrington Street, Halifax.

The Notice of Appeal (Exhibit C-1) was in the form of a letter and signed personally by the Appellant, Norval H. Collins, although it bore the letterhead "Computer Environmental and Fisheries Consultants" which is evidently an orgnization owned by and employing Mr. Collins. The Board relies on Mr. Collins' statement that the use of this particular letterhead was merely a method of his using what paper was present and available for him. This Notice of Appeal was dated February 15, 1988, and was received by the Board on February 15, 1988, and appealed a rezoning of the Union Street area from R-2 to R-1, made by the City of Halifax on January 14, 1988, publication of which rezoning was made on January 25, 1988.

The Board assigned the Chairman to peruse the Notice of Appeal and to determine whether or not the Notice of Appeal complied with the Planning Act, S.N.S. 1983, Chapter 9 and the rules made thereunder as to form and content of an appropriate Notice of Appeal. The Chairman took no objection to the Notice as filed.

The full body of the Notice of Appeal said:

"Re: Appeal of Rezoning of Union Street Area from R2 to R1

Decision: Rezoning of Properties on Union Street and Immediate Vicinity from General Residential (R-2) Zone to Single Family (R-1) Zone

Jurisdiction of Decision: City of Halifax

Date of Decision: Jan 14, 1988

Publication
of Notice: Jan 25, 1988

Location of
Appellant: 3247 Union Street,
HALIFAX, N.S.

As a resident within the area affected by the decision to rezone from R-2 to R-1, I would like to appeal of this decision for the following reasons:

1. The rezoning unnecessarily restricts the potential development of my property, limiting any external extensions of an nonconforming R-2 use.

2. The City of Halifax has not provided reasonable justification for the rezoning.

3. The City of Halifax has not supplied data supporting the accuracy of the summary statistics provided in their background information reports, thereby making it impossible to determine whether or not the information presented is an accurate representation of the information.

4. The City of Halifax has not observed general principles of planning in relation to this decision, i.e., this decision has not been considered in relation to its impact on the City as a whole as defined by the Municipal Planning Strategy.

In requesting this appeal, I agree to be responsible for publication of the required notices."

Paragraph numbered 4 of the above Notice of Appeal certainly states an arguable ground of appeal.

The decision appealed from made by City Council allowed the rezoning of certain areas in the Union Street area in the north end of Halifax graphically shown as outlined in black and coloured in yellow on Exhibit C-22 and encompassed property on Needham Street, property on Union Street and property on Young Street and property on Devonshire Avenue.

The southernmost boundary of the rezoned area is the northern most boundary of Kaye Street. The easternmost boundary is Albert Street until its intersection with Devonshire Avenue when the boundary moves eastwardly along the northern boundary of Hanover Street, one lot in depth and thence northerly by the back line of those lots facing on Albert Street (or Devonshire Avenue) until it arrives at the southernmost boundary of Richmond Street. It then proceedes (the northerly boundary is basically the extension westward of Richmond Street) until it meets the easternmost boundary of Fort Needham Memorial Park. The westerly boundary of the rezoned area consists of the easternmost contiguous boundary of Fort Needham Park. This boundary proceedes along that Park boundary going further westerly all the time until it reaches the rear lines of a large property facing on Gottingen Street. It then proceeds southerly along the large property facing on Gottingen Street (Novalea Drive) until it hits the northern boundary of Young Street. It then crosses Young Street after a short jog to the east from the easternmost boundary of the fourth property along Young eastwardly from Gottingen Street (Novalea Drive). The boundary then follows the eastern boundary of that fourth property until its rear line. The boundary then goes westwardly a short distance until it meets the westerly boundary of the second property shown facing Kaye Street. It then follows the westerly boundary on the lot facing Kaye Street until it reaches Kaye Street thus enclosing a figure that, although it has 17-odd different boundaries, is roughly rectangular in shape and with its narrow portion running east and west and which is centered on the built-up area of Union Street. The existing uses on Union Street, as compiled by the Appellant Mr. Norval Collins, are shown on Exhibit C-10.

Mr. Collins is the resident owner of a duplex building at 3247 Union Street, in the City.

Mr. Collins' appeal seeks to have the Board reverse the decision of the City Council made January 14, 1988 and advertised January 25, 1988, in which City Council decided to rezone all the above-described area from R-2 to R-1.

The appeal came on for hearing at 10:00 a.m. on April 13, 1988, at the World Trade and Convention Centre, Argyle Street, Halifax, pursuant to a Notice of Hearing, Exhibit C-3, made by Doreen White March 15, 1988. Service of the Notice of Hearing was properly and adequately proved by an Affidavit filed as Exhibit C-14 and the appropriate advertisement of the Notice of Hearing was made.

The appeal was filed with the Board within time pursuant to Section 63(2) of the Planning Act which reads in part:

> "An appeal filed pursuant to subsection (1) shall be served on the board within twenty-one (21) days of the date of the publication of the notice of the adoption of the amendment..."

These are the excerpts from the Planning Act sections bearing on this appeal which bear quoting here:

> "51(1A) A council, on its own motion or on the application of any person, may subsequently amend a land-use by-law in accordance with policies contained in the planning strategy.

(2) A council shall not adopt or amend a land-use by-law except to carry out the intent of a municipal planning strategy.

63(1) the amendment revision or refusal by a council to amend or revise the land-use by-law pursuant to subsection 1(A) of Section 51 may be appealed by

(a) an aggrieved person

...

(1A) in subsection (1) "aggrieved person" includes

(a) an individual who bona fide believes that the amendment, revision or refusal by council to amend or revise the land-use by-law will adversely affect

i) the value of or the reasonable enjoyment of that person's property, or

ii) the reasonable enjoyment of the property occupied by that person;...

63(3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy.

(4) The Board may

a) confirm the decision of the council;

b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law; or

c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board.

(5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

The Board must determine in this case whether the Appellant is an aggrieved person within the meaning of the Planning Act (section cited above). Mr. Allen objected to Mr. Collins' status as an aggrieved person at the opening of the hearing. After verbal argument, the Board reserved the question and proceeded with the hearing. The Board deals with this issue fully at page 19 of this decision. Since all notices required including the Notice of Appeal had been filed and served within time, the Board, subject to its finding the Appellant an aggrieved person, therefore assumed jurisdiction to hear the appeal.

The area rezoned in this matter has been graphically set out in Exhibit C-22 as noted above and has been described previously in this decision. There is no specific development threatened, approved or dealt with in the rezoning process in this particular matter. The intention of this rezoning process is to prevent some particular types of developments in the area rezoned that were previously allowed. The effect of the rezoning will be to prohibit certain types of development, none of which were in the proposal stage at the time of the rezoning action, which previously had been permitted. In the R-2 Zone on the Mainland Peninsula North zoning area (one of which is the rezoned area) it is permitted to build residential units varying in number from 1 to 4 residences per building. The effect of the rezoning will be to make the existing duplexes, three unit, and four unit buildings now located in the subject R-2 Zone into non-conforming uses while the existing single family dwellings will remain unaffected so long as their owners do not seek to increase the number of dwelling units on their lots. This appeal differs in some respects to many other types of zoning appeals that have been brought before the Board in that it is not made in response to any immediate development proposals.

The Appellant testified himself and called William Campbell, Barry Woodworth, Ross MacNeil, Ronald Smith, Edward Dugas, Michael Hanusiak, and Susan Halpert. Mr. Allen on behalf of the City recalled William Campbell. Two citizens at large, Richard Lawrence and Thomas Khatter, residents of Union Street, gave evidence on their own behalf.

At the end of the evidentiary portion of the hearing the Board adjourned decision pending receipt of exchanged briefs which would be filed on or before April 30, 1988 and which, in fact, were received on April 29, 1988. Mr. Collins had filed a pre-hearing brief with the Board. The Board took a self-conducted, windshield view of the Union Street area outlined above.

Mr. Collins first gave evidence with a view of qualifying as to his ownership of property on Union Street, how the rezoning would affect his use of that property and also as to his expertise as a planner entitled to give opinion evidence. He was so found by the Board. He then adjourned his testimony with consent of the Board and the City to accommodate certain other witnesses.

William B. Campbell then was called and qualified as a planner entitled to give opinion evidence in the matters of planning as they affected the City.

William B. Campbell is a Senior Planner for the City of

Halifax and lives in Halifax. Mr. Campbell testified that the R-2 Zones in the Peninsula North Section of the City permits a range of residential uses from one unit building to four unit buildings on each otherwise approved lot. He noted that the piece of rezoned area south of Young Street was within the detailed area planning location number 4 for Peninsula North, Halifax. He said "the requirements for R-2 zoning" differs within the City according to the provisions of various detailed area plans. Mr. Campbell stated that in his opinion the rezoned area was mostly within the "hard" area contemplated in the Municipal Planning Strategy although a small portion of land on the west of Albert Street might not be and the portion of land to the south of Young Street was in a detailed area planning area in which final decisions of approval by Council were imminent. He felt that the area was predominantly "hard". Mr. Campbell reviewed various policies in the Municipal Planning Strategy (hereinafter referred to as the "M.P.S.") of the City (Exhibit C-8). He suggests the overriding function was to promote neighbourhood stability in a hard area and to preserve the residential character of the neighbourhood. Mr. Campbell was of the opinion that the rezoning in the area was consistent with the intent of the M.P.S.

Mr. Campbell felt there was not a formal application for rezoning in this case although a Petition has been filed requesting part of the rezoning and that the rezoning was basically a Council-commenced rezoning, at least at the point when City staff studied the rezoning.

Mr. Campbell was of the opinion that the staff reports filed with Council accurately set out the facts relevant to the appeal with sufficient accuracy that Council could make an appropriate decision within the intent of the M.P.S. Mr. Campbell said that the vast proportion of the lots in the R-2 zone, the area rezoned to R-1, were in R-1 usage. Mr. Campbell tried to give some historical allusions to the subject area.

Barry Woodworth, Assistant Director of Assessment, who lives in Clayton Park, Halifax, testified as to the occupation shown on the assessment records of 3251 Union Street, 3247 Union Street, 3258 Union Street and 5385-87 Young Street.

Ross MacNeil, a self-employed manager at Dugger's Men's Wear Ltd., owns 3251 Union Street. He said he may be considered a small developer. He had invested in 3251 Union Street because it looked like a good property to invest in. He felt that R-2 zoning was a factor which encouraged him to invest and the lot frontage on the street was 60 feet. He bought it with the possibility of making a four-unit building or selling it to somebody else. The building now has two units.

Ross Smith of Enfield, owns 5385-87 Young Street which is one building. He feels that the rezoning will affect his interest in the selling potential of that building. He has had some trouble closing a property deal for this building because of representation as to zoning required to be made by him pursuant to requisitions made by the purchaser of his property.

Edward Dugas, 3232 Union Street, is employed by the Federal Government Department of Labour, and has lived on Union Street for over 30 years. He bought his present house about 4 years ago. He had enough additional frontage on his lot which enabled him to build three additional residential units. He said there have been no vacant lots on Union Street for the past ten years and he does not see that there is going to be a lot of building or development in this area. He took the precaution, when building those extra units to give the appearance of one large house to be comparable in appearance with the surrounding houses. He said he had problems in developing his lot. He made a wall to hold back the water drainage from Ford Needham which he found excessive. Mr. Dugas said his property was so hard to develop with necessary parking that he felt he would not repeat the development on his lot if he had a choice to do so.

Michael Hanusiak, Planner for the City, resides at 21 Crestfield Drive, Bedford. He was also qualified as an expert in matters of planning. He testified as to his opinion of the purpose of R-2 zoning in Halifax and he felt it was to provide a variety of housing units. He thought it was very difficult to give a proportional breakdown of residential uses in the area. He did not know too much about the proportion of multi-unit uses in the area and he felt that probably it was 12 or 13% of the developed residential occupation. He testified that non-conforming use, the traditional definition of non-conforming use, was eventual eradication of that restricted uses by the efluxion of time through the prohibitions against rebuilding destroyed buildings, reoccupying in the former use disused buildings, and the refurbishing of the buildings with outside increments.

Mr. Hanusiak felt that the "hard areas" are generally intended to be stable. He was not aware of any law that says that an application for a rezoning must be in a specific form of a petition or that the petition form used here was not an acceptable method of getting a rezoning done.

Mr. Hanusiak felt that some of the alternatives to the present rezoning were to leave the R-2 zoning as it did exist or to rezone the multiple uses appropriately and then to rezone the R-1 uses to R-1. He thought these alternatives could have been considered by council but were not.

In response to questions by the Board, Mr. Hanusiak was of the opinion that the R-1 zoning is in effect unless, and until, the Board overturns Council's decision. If during the apparent hiatus between Council's decision approving the rezoning and before the delivery of the Board's decision, Mr. Hanusiak was asked by a counter customer at the City's Planning Office as to his opinion of the zoning of any of the land in the subject area, he would tell them it was R-1. He further stated the opinion that a residential use, even if vacant, would be continued and would be a use still existing whether somebody was living in it or not and thus the time element erasing the non-conforming use would not apply and that the non-conforming requirements would be still in effect.

Susan Halpert, an appraiser, recited her qualifications and was qualified as an expert entitled to give opinion evidence on the valuation of land in the City. She felt that the rezoning in this case would enhance the value of those dwellings in the area which are single family dwellings and detract from the values of those that were multiple dwellings.

Mr. Collins then returned to the stand and was questioned by Joanne Cook who was assisting him in this appeal.

Mr. Collins testified for a long time. He noted that he was a director of the Community Planning Association. Mr. Collins gave a great deal of evidence that may fairly be summarized as follows: that the rezoning had no cause that he could see; that the neighbourhood had been stable for some considerable period of time and that the R-1 rezoning, in fact, would prevent development in the area which could convert existing single family dwellings into duplexes, triplexes and quadruplexes. Also he said that changing present multiple unit property to non-conforming uses would greatly inhibit the outside exterior alteration of those non-conforming buildings. Mr. Collins, in essence, was of the opinion that the R-2 zoning calling for the mix of housing in the area exactly met the intent of the M.P.S. and that the decision of Council was contrary to that intent because it froze development very closely in its present state. In Mr. Collins' opinion, Union Street was very similar to other R-2 areas in the north end of Halifax as to percentage of mix of use and he could see no problem existing that was being cured by the proposed rezoning. Mr. Collins also alluded to the difficult topography of Union Street due to the slope down from Fort Needham and gave the Board a diagram showing the grades that are relevant to the development of land between Fort Needham and the harbour.

Albert Charles Richard Lawrence, a technician of the V.G. Hospital and a resident of Union Street, said that he had become aware of the effect of R-2 zoning in his neighbourhood (which was Union Street itself in his view) when a minor variance had been asked for, and had been refused, by City Council. He then had become fully aware that multiple units could be made (up to four) in his R-2 area depending on the size of the lots in the area. He said that the multiple units that exist on the street have often caused trouble to the citizens both with parking and with lack of commitment to the community by their tenant inhabitants. Mr. Lawrence said he was not interested in the values or devaluation of the property, merely the stability of the community as it now exists and which he had found suitable to live in. He said that the Dugas condominium development caused a lot of problems in the neighbourhood. Mr. Lawrence admitted that there has not been very much new construction in the area.

Thomas Khatter of 3189 Union Street is a barrister and he supported Mr. Lawrence's comments. He has only been living on the street for a short period of time. He has two children aged four and nine in his family. He bought a property that had been a rooming house and renovated it back into a single family dwelling. Mr. Khatter takes his position in the community seriously. He makes sure that vehicular traffic on Union Street is supervised. He related the problems that have existed on Union Street with traffic and snow cleaning. He has a concern that if all the available lots on Union Street of an appropriate size were upgraded to four units more transients would be in the community, the nature of the community would be changed and he would no longer find the Union Street area a proper place to live and to bring up his family.

William B. Campbell was then recalled by Mr. Allen on behalf of the City. He brought in the Petitions that had been filed and zoning plan C-22 previously referred to. He feels that the boundaries between the "soft" and "hard" areas in the City are "mobile". He feels, also, that the boundaries between the areas for detailed area planning and the areas not for detailed area planning are "mobile" in each case depending on the wish of the neighbourhood. He noted that City Planning staff had increased the original Union Street application to include land on Albert, Young and Needham Streets.

There was much discussion between the Board, Mr. Campbell and Mr. Collins concerning the availability of facts in the City planning file when Mr. Collins was requesting the same in preparing his presentation for Council.

Mr. Collins has made complaints of non-disclosure of information that was available with the City on its rezoning application. As Mr. Allen pointed out, Mr. Collins has recourse through the Courts to enforce his rights, if any, to the production of that information. Without saying too much more on the subject the Board draws the City's attention to Section 12- Citizen Participation and particularly 12.4, 12.5 and 12.6.

Before proceeding further, the Board wishes to address itself to certain portions of the Norval Collins brief.

The Board notes that on the back of the brief there is a curriculum vitae of Mr. Collins and a certificate. The Board must disregard that certificate and the curriculum vitae on the grounds that these items are evidence and that the evidentiary portion of the hearing is finished prior to the presentation and drafting of the brief. The Board also notes that Mr. Collins attended upon it on the 2nd day of May, 1988, in order to file another certificate. At that time, the Board met him and refused to consider the document. For guidance on the appropriate material to be contained in a brief the Board refers to Cummings v. Director of Assessment (1986) 5-A, M.B.D. 26, in which the Board has set out the standards that apply to the contents of a post-hearing brief.

In the rest of his written argument, Mr. Collins makes various other submissions and the Board will deal with some of them here. At page 5 of his brief he has this statement to say:

> "There are two possible procedures that can initiate an amendment. First, a property owner can apply for rezoning to obtain permission to allow a specific piece of land to be used for a purpose other than that which is permitted by the present zoning. Second, City Council can initiate a rezoning if the area is not in conformance with the policies or intent of the M.P.S.".

Mr. Collins cites no section of the Land-Use By-law or no section of the M.P.S. in support of this proposition. Assuming the proposition to be correct in law, he then states that in the particular case there was only a petition filed but neither one of these two procedures were used and therefore there can be no rezoning. He cites Section 60 of the Planning Act and says that "...no other requirements of Section 60 of the Planning Act followed". Section 60 of the Planning Act reads:

> "A Council shall include the preparation of a land-use by-law, or an amendment thereto to implement either a planning strategy or an amendment to a planning strategy, for consideration in the public participation program for the planning strategy or amendment to a planning strategy."

With all respect to Mr. Collins, the Board cannot see how Section 60 of the Planning Act applies to this particular situation which is a pure land-use by-law amendment and not a by-law made in conjunction with or supplemental to an M.P.S. drafting or an M.P.S. amendment.

Mr. Collins then goes on to argue that the M.P.S. clearly designates most of the area rezoned as a "Hard Area" as defined in Policy 2.4.2 to define stable neighbourhoods. If Council proposed a rezoning of Union Street because it was unstable, a "Soft Area", it should have amended the M.P.S. to reflect such a change to give it the right to carry out such a rezoning. If Council viewed the area as unstable (Soft) Council was required to follow the policies outlined for rezoning of "Soft Areas" in the preparation of a detailed area plan (Policies 2.5 to 2.5.5). If Council did not view the area as "Soft" there is no justification for the rezoning. At page 7 of his brief, Mr. Collins makes the point that the area proposed by the citizens to be rezoned was the Union Street area only and that staff gathered statistics concerning that area and that the Needham/Young Street and a short portion of Devonshire Avenue or Albert Street as the case may be, were not used in the statistical gathering of information. From that he concludes that Council was ill-informed and therefore their decision could not carry out the intent of the M.P.S. He cites the Board decision of Benedict v. Truro (1985) 4-B, M.B.D. 291, as authority for the proposition that Council must be fully informed.

Mr. Collins makes the additional point in his brief that part of that area was covered under the detailed area plan for Peninsula North, namely the Young Street to Kaye Street area which was under active consideration from Council for rezoning. He argues that neither the M.P.S. nor the Planning Act permits Council to basically consider two simultaneous rezoning applications in the same area.

Mr. Collins also argues that the City failed to provide him with proper access to information so that he could prepare for the public hearings responsible for the appeal.

Mr. Collins also argues that the rezoning would make too large a proportion of property into non-conforming uses and that is not contemplated by the M.P.S. At page 15 of his brief Mr. Collins argues as follows:

> "At the time of adoption of the M.P.S., the existing use in that area must have been considered to meet these criteria and therefore the existing use must have been considered to reflect both the existing R-2 zoning and the intent of the M.P.S. Evidence before the Board demonstrated that there has not been significant change in the existing use within the area since 1977. Therefore, before the area could be rezoned, the City had to demonstrate that significant change had occurred. The City's only argument for rezoning was based on latent development potential that cannot reasonably be said to have changed since the adoption of the M.P.S. In any case, latent development potential is irrelevant to the criteria for defining hard areas."

Further at page 17:

> "It is clear that the large amount of R-2 zoned land in the Northern Peninsula was intended to meet policy 2.1.1 for increased density of the peninsula."

Mr. Allen filed a brief on the same day as Mr. Collins setting out the position and argument of the City. In his brief, Mr. Allen attempts to show that Mr. Collins is not an aggrieved person within the present meaning of the statute. He cites the Riverlake Residents' Association (1985) 4-B, M.B.D. 124, and then he tries to argue (page 4 of the brief) that even with the change in legislation mentioned before in this decision that:

> "Mr. Collins' status as an aggrieved person depends entirely upon an assertion that his lot contains a legal two-unit building which will become non-conforming if the rezoning becomes effective...
>
> The difficulty for the Board is that it must be satisfied on the evidence that the Appellant has a legal two-unit use which will become non-conforming. The evidence on this point is that while Mr. Collins has someone living in his basement, he does not have a valid occupancy permit for that use, and otherwise presented no evidence to show that his use of the property is legal. As the owner of the property, he is the only one who could adduce evidence on that point

> and his failure to do so leaves the Board without evidentiary foundation upon which "reasonable belief" of the affect of the rezoning would be based. It is the submission of the Respondent that Mr. Collins is not, on the evidence, an aggrieved person within the meaning of the Planning Act."

The Board merely wishes to point out that there is somebody in occupation in the Collins building and Mr. Collins has made some allusion to the fact that they are legally there and that the Board is entitled to infer that Mr. Collins occupies his property with at least a duplex occupation and therefore his use of the property will become a non-conforming use and he therefore will suffer some sort of injury qualifying him as an aggrieved person. If Mr. Allen wished to rely on his argument he would have had to adduce more evidence to prove his allegation of a "negative" to a balance of probabilities to move the Board to find this "negative" fact in the City's favour. The Board has listened to all the evidence and concludes that the Appellant, Norval Collins is an individual with a bona fide belief that the amendment of the by-law will adversely affect the value of or the reasonable enjoyment of his property located on Union Street and therefore is included under Section 63(1A)(a)(i) of the Planning Act which gives him status to be an Appellant in this matter.

Mr. Allen further argues that the burden is upon the Appellant to adduce evidence from which the Board can determine between Section 63(3) and 63(5) of the Planning Act that the decision of the Council cannot reasonably be said to carry out the intent of the M.P.S. otherwise the Appellant must fail. Mr.

Allen then goes on to argue that the decision of the Council was within the intent of the M.P.S. and that even if the opposite conclusion were within the intent of the M.P.S. the Council's decision must be upheld by the Board.

At page 7 of his formal submission Mr. Allen has this to say:

> "It was agreed by both Mr. Collins and Mr. Campbell in their evidence that the policies which are applicable to a consideration of R-1 zoning are 2.1, 2.1.1 and 2.4 with policy 2.4 being the predominant policy.
>
> ...
>
> > "...neighbourhoods exhibit different characteristics through such things as their location, scale, and housing age and type, and in order to promote neighbhourhood stability and to ensure different types of residential areas and a variety of choices for its citizens, the City encourages the retention of the existing residential character of predominantly stable neighbourhoods, and will seek to ensure that any change it can control will be compatible with these neighbourhoods."
>
> It is also agreed by both Mr. Collins and Mr. Campbell that the rezoned area is a stable neighbourhood and that the zoning for the neighbourhood should encourage that stability.
>
> It is submitted that the sole point of divergence between the positions of the Appellant and the Respondent is whether the stable character of the neighbourhood worthy of protection consists of predominantly single family community or one containing a mix of residential uses which should be allowed to develop as market forces dictate."

And further at page 9:

> "It is certainly clear from the evidence that a majority of the neighbourhood consists of single family dwellings and that majority is probably a substantial one.
>
> Given that fact, the question for Council becomes is

> the neighbourhood better protected by R-1 zoning or R-2 zoning.
>
> Zoning to R-1 would mean there could be no further conversions of the single family houses and they would thereby be protected. Furthermore, the multi-unit buildings in the area would be protected by the non-conforming use provisions of the Planning Act. In time, these properties would tend to be converted back to single family uses which would enhance the stability of the area as an R-1 neighbourhood.
>
> Zoning to R-2 would mean that further conversion of the existing single family homes to multi-unit structures could occur and the area more intensely developed to the maximum potential of the R-2 Zone. Whether that would be actually happening in the future is unknown. What is known is that given the lot sizes in the area, there is a potential for it to happen in future, and it is that potential which must be either encouraged or discouraged through zoning to protect or create the kind of neighbourhood you want."

Mr. Allen further indicated that the Board has a duty to consider the views of the residents of the area affected by a planning decision in determining what constitutes a neighbourhood. He further went on to say that the residents of this particular area felt that instability would be created by development of multi-unit buildings and not by conversion of existing multi-unit buildings to single family buildings. He concludes and makes the argument towards page 11 of his brief:

> "In making its decision to rezone, Council was not directed by a mandatory policy of the M.P.S. that the area must be R-1. In this case, the M.P.S. provides a principle for Council to follow in making rezoning decisions, that being the maintenance of stable neighbourhoods. In an area such as Union Street, there is obviously a degree of discretion available to Council...what is the nature of the existing neighbourhood, what it should be in future, and what planning tools (i.e., what zone) will best achieve that objective.

The evidence presented in this hearing supported the

> decision taken by Council and certainly confirmed that the decision was within the range of possible zoning for the area and therefore can be reasonably said to carry out the intent of the M.P.S. It is submitted that the decision was not only within the range of possibilities but was in fact the best decision for the area."

Mr. Allen summarized his brief on page 15:

> "The Appellant has not discharged the burden on him of proving on a balance of probabilities that the decision of Council cannot reasonably be said to be consistent with the M.P.S.
>
> The M.P.S. gives no mandatory direction whether the areas should be zoned R-1 or R-2. [Possibly] either zoning is appropriate for the area. Certainly R-1 zoning is within the range of possibilities permitted by the M.P.S. and is likely the best zoning for the area within the context of the M.P.S."

Both parties to this zoning appeal made extensive citations from the M.P.S. and the Board has itemized the text of these in Schedule "A" to this decision together with any other portions of the M.P.S. or the L.U.B. that the Board thought particularly relevant to this appeal.

As pointed out before, this application is different from many rezoning application appeals that come before the Board in that no developer is involved with a specific scheme threatening to affect a given neighbourhood.

According to the evidence, there have been three situations that have occurred in the Union Street area which have upset the people who live along Union Street and those are the four-unit conversion previously alluded to, the application for a minor variance which has been previously mentioned and the opening up of the Bell Tower on Fort Needham and the tourist bus route up Union Street around the Fort Needham open area. According to the testimony of the residents, elected civic officials had assured them, prior to the inception of the bus service, tour buses destined for the Bell Tower in Fort Needham would not use Union Street as an access road. This perceived betrayal has not been accepted easily by the neighbours resident on Union Street. The neighbours that have testified in this hearing and those that have signed the large petition filed with the Board have passed along the opinion that they are satisfied with the neighbourhood as it is and they don't want too many radical changes. Those neighbours who opposed the scheme and bothered to testify were, by and large, against any increase in density on the street for traffic reasons and for social reasons.

The Board will now resume dealing with one side of Mr. Collins' objection - namely that this was an application and that the provisions regarding an application to rezone had not been carried out. Previous in this decision the Board has alluded to the fact that Mr. Collins has misinterpreted Section 60 of the Planning Act and it merely repeats this reference here. The M.P.S. on page II.201 **AMENDMENTS TO THE ZONING BY-LAW**, Sections 4 and 4.1 insure that the proposal to rezone would conform to this plan (the M.P.S.) and to all other City By-laws and regulations. In the view of the Board, an application could be made to rezone and that application would have to conform, inter alia, to the Land Use By-law.

The Land Use By-law, Section 12, requires that an application to amend the Land Use By-law must be accompanied by a fee at the time of making such application, in the amount of $100.00. There is no evidence before the Board to indicate that the citizens either signed an application or paid any fee to attain this By-law. The only possible document that may be an application in this matter is the Petition signed by many citizens of Union Street who, on the text of their Petition, only signed to rezone both sides of Union Street. Thus it is clear that if an application was necessary in this case and was made, it was not made in conformity with the Land Use By-law, that the Land Use By-law was required to be complied with in any application under the terms of the M.P.S. cited above, and therefore, the decision of Council violated the M.P.S., (Section 4.1) and therefore the decision of Council could not reasonably be said to be within the intent of the M.P.S. That, the Board understands, is the one arm of Mr. Collins' argument (with the missing references to the underlying statutorily derived instruments now supplied by the Board) previously mentioned. If, in fact, the present rezoning is the result of an application to rezone then, of course that is the end of the matter: The rezoning would be reversed.

The Board will now review whether the signing of a Petition and delivering it to Council in the manner that was done in this particular appeal amounts to an application to rezone. The Planning Act itself in Section 51(1)(A) provides for an application by any person to amend a land use by-law. The previous Section cited from the M.P.S. and from the L.U.B. of the City clearly show how such an application is to be handled.

The Board has carefully perused Exhibit C-9 which contains the only documents voluntarily tendered to us by the City concerning the present rezoning application at or prior to the opening of the Board hearing. In that Exhibit dated January 6, 1988, there are extracts from the Minutes of City Council which are certified to be correct. The title is "Intention to Amend the Land-Use By-law". In the second paragraph of the extracts it reads as follows:

> "Mr. W.B. Campbell, Senior Planner with the Planning and Development Department advised that this particular request for rezoning originated as a result of a Petition received by Council...residents who reside on Union Street. Mr. Campbell then outlined the application as contained in the Staff Report dated October 30, 1987 [emphasis by the Board]."

In extracts from the same Minutes contained on another page [the Board finds these extracts extremely distressing since they clearly show an editing of what occurred at Council]:

> "Moved by Alderman O'Malley, seconded by Alderman R. Grant that this matter be forwarded to Council without recommendation".

A report evidently to the Committee of the Whole November 4, 1987, dated October 30, 1987, has at the opening paragraph:

> "Submitted a Petition from residents of Union Street requesting rezoning...".

We have extracts from meetings of City Council on March 12, 1987, which merely deals with the "proposed rezoning" Union Street and any other reference to the rezoning were also in neutral words. A document entitled "Union Street Rezoning" dated September, 1987, attributed to the Development and Planning Department of the City of Halifax, contained in the same Exhibit in its introduction referred to "this matter to staff for review and report". This report makes no reference to any application. The Notice of Advertisement for Public Hearing dated November 16, 1987, also a portion of the Exhibit, makes no reference to any application. A letter of Mr. Norval Collins, the present applicant, dated December 28, 1987, has the phrase "of the issues associated with the rezoning application prior to the public hearing". Mr. Collins clearly at that time felt in his mind that there was an outstanding application to rezone. Extracts from Minutes of the City Council, Halifax, of November 12, 1987, contained in the Exhibit are noncommittal. Extracts from the meeting of City Council dated January 14, 1988, merely refer to the Land Use By-law rezoning of properties on Union Street.

It appears from the contents therefore of Exhibit C-9 to be only two references consistent with the fact that the present rezoning was made as a result of an application. The first was the Council Minutes which appeared to attribute that idea to Mr. Campbell, the planner, and also the letter of Mr. Collins which clearly called the transaction in question an application.

Mr. Collins view is self-serving to the extent that if this matter were an application his argument as outlined above would succeed. If Mr. Campbell accurately depicted the transaction as an application then of course since he was a civic employee in a responsible position that might be an admission against interests of the City and therefore lead to a finding by the Board that the transaction complained of was in fact an application to rezone. The Board with care again has gone back over the extracts from the Minutes of January 6, 1988. Those Minutes do not attribute the use of the word "application" to Mr. Campbell when read carefully but appear to represent, at least to this Board, the wording used in describing the transaction by the taker of the Minutes. The Board would assume that the taker of the Minutes would be not a person employed by the City in a highly skilled position having sufficient knowledge of planning to be able to categorize the transaction correctly to the extent that the City would be bound by his characterization. All the items otherwise listed including the report of October 30, 1987, with which the word "application" is linked in the extracts from the Meeting of January 6, 1988, are very neutral and do not deal with the word "application".

It is clear that if the Council acted to pass the rezoning under Section 51(1)(a) of the Planning Act, Council might also, on its own motion, "subsequently amend a Land Use By-law".

This Section empowering the Council to act is also reflected in Council's general duties at page II-198 of the M.P.S. See Policy 3.7.1 where the City has set itself the positive duty from time to time to review the Zoning By-laws of the City to seek ways in which they may be brought into greater harmony with its plan. At M.P.S. AII-41, (12) - Citizen Participation - there is an objective for having citizen participation and the Board would suggest that the reception of a Petition by Council and Council acting on that citizen participation falls within this general objective of the M.P.S.

Council did act and had power to act within the Planning Act and its M.P.S. and its Land Use By-law in this matter (although not on an application since they did not follow the proper procedures dealing with an application). Since Council did act and since it had power to act, the rebuttable presumption of legality applied and proves that it acted legally. The only way it could act legally to rezone was to make a rezoning on its own motion as set out in Section 51(1)(a) of the Planning Act. Mr. Collins did not adduce enough evidence to rebut the presumption of legality and therefore the Board does find that there was no application involved in this rezoning. The Board has also found that City Council acting on its own could or was empowered to rezone and therefore this particular argument of Mr. Collins' (that there were two ways only to have a rezoning occur and that the City properly followed neither of these two ways) fails. The Board finds that the City was acting on its own motion within the meaning of Section 51(1)(A) of the Planning Act to rezone the subject land.

The question then arises are there other reasons why the decision of Council does not reasonably fit within the intent of the M.P.S.? The burden on Mr. Collins as Appellant is basically to show that in some aspect the decision of Council does not reasonably conform to the intent of the M.P.S. His arguments have been set out in considerable detail before, but he basically says that the general intent of the M.P.S. in the R-2 areas is to infill and upgrade the densities on the Peninsula of Halifax by allowing increased residential development especially in R-2 areas such as the one in question. Mr. Collins argument in a nutshell, as understood by the Board, is that this overriding policy is now being met gradually by a slight degree of residential density increase in the Union Street Area and that any change from such regulations will be destabilizing and thus contrary to the intent of the M.P.S.

The position of the Petitioners as discerned from the evidence adduced before the Board is that they feel that their community will be destabilized by continuing the present regulatory framework embodied in the R-2 Zone and that they basically wish to freeze the present uses in position and to make any multiple uses into non-conforming uses by going to the R-1 zoning.

The Board finds Mr. Collins' logic in this main argument intricate and persuasive enough to demand its fullest scrutiny. On the other hand, the Board clearly hears the message of the majority of the inhabitants of the general area that it appears to desire the freeze even in the absence of a threat of a large impending and known proposal for development.

The Board would therefore assume that the reasons as expressed by some of their spokesmen are "calm" reasons, contemplated over a period of time and were respected by the City Council. The action of the inhabitants in this particular case are not the usual panic actions that the Board sees when people suddenly become involved in the planning process in the face of some development that crops upon their immediate horizon. In a case such as this appeal, the Board is prepared, as was City Council, to give good credence to the clearly expressed wishes of the people as contemplated by Section 2(c) of the Planning Act.

Mr. Collins gave a great deal of information in his testimony during the long hearing before the Board. The Board, however, looks at his letter of December 28, 1987, which was a long letter to Mr. Richard Matthews, Director of Planning, and refers particularly to paragraph 4 conclusions:

> "The staff reports were thorough and reasonable given the resources available and the importance of the task. What is lacking however, are criteria that may be important in the decision and the evaluation of the possible effect of this decision on other R-2 areas in the City."

The Board tends to agree in part with his assessment of the Staff Reports. It has difficulty however, in finding support in the M.P.S. for the alleged lack of the "criteria that may be important in the decision... on other R-2 areas in the City."

The Board is satisfied that the decision was made in a calm atmosphere without undue partisan excitement under the threat of precise developmental incursions into the neighbourhood. The Board is prepared to agree with the arguments that have been put out by Mr. Allen that a decision by Council to leave the zoning as it was might have been consistent with the M.P.S. and yet the decision to change is also consistent with the M.P.S.

The function of the Board in cases such as this is not to second-guess the Council but to test whether the decision of Council reasonably conforms with the intent of the M.P.S. When the Board, as it has done in this case, makes such a determination, it is prohibited from interfering with the decision of Council.

For all the reasons set out above the Board is satisfied that the decision of Council herein appealed reasonably fits the intent of the M.P.S. and therefore the Board is unable to interfere with the decision of Council.

In consequence, the Board, pursuant to Section 63(4)(a) of the Planning Act will confirm the decision of Council and dismiss the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 10th day of June, A.D., 1988.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

SCHEDULE "A"

EXCERPTS FROM EXHIBIT C-8, THE MUNICIPAL PLANNING STRATEGY OF THE CITY OF HALIFAX, AS OF JANUARY 14, 1988.

INTRODUCTION

Part II constitutes the Municipal Development Plan for the City of Halifax as required by the Planning Act.

...

Under the provisions of the Planning Act, a municipality cannot regulate directly from a Municipal Development Plan; rather, it must regulate from a Zoning Bylaw adopted by the municipality to carry out the intent of the Plan.

...

SECTION I

BASIC APPROACH AND OVERALL OBJECTIVE

The basic decision-making approach to the City of Halifax with respect to development is that:

> Objectives, policies, plans, and programs shall be identified and shall be the foundation for decision-making with regard to the physical, social and economic development of Halifax. In consideration of development matters, alternative courses of action shall be identified and evaluated, whereupon the proper course of action can be selected.

The overall objective of the Halifax Municipal Development Plan and for ongoing planning is:

> The enhancement of the physical, social, and economic well-being of the citizenry of Halifax through the preservation, creation, and maintenance of an interesting and livable City, developed at a scale and density which preserve and enhance the quality of life.

SECTION II

CITY-WIDE OBJECTIVES AND POLICIES

1. ECONOMIC DEVELOPMENT

...

1.7 The City should establish land-use regulations that promote the development of high quality commercial, industrial and residential areas.

2. RESIDENTIAL ENVIRONMENTS

OBJECTIVE

The provision and maintenance of diverse and high quality housing in adequate amounts, in safe residential environments, at prices which residents can afford.

2.1 Residential development to accommodate future growth in the City should occur both on the Peninsula and on the Mainland, and should be related to the adequacy of existing or presently budgeted services.

2.1.1 On the Peninsula, residential development should be encouraged through retention, rehabilitation and infill compatible with existing neighbourhoods; and the City shall develop the means to do this through the detailed area planning process.

...

2.2 The integrity of existing residential neighbourhoods shall be maintained by requiring that any new development which would differ in use or intensity of use from the present neighbourhood development pattern be related to the needs or characteristics of the neighbourhood and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate.

...

2.4 Because the differences between residential areas contribute to the richness of Halifax as a City, and because different neighbourhoods exhibit different characteristics through such things as their location, scale, and housing age and type, and in order to promote neighbourhood stability and to ensure different types of residential areas and a variety of choices for its citizens, the City encourages the retention of the existing residential character of predominantly stable neighbourhoods, and will seek to ensure that any change it can control will be compatible with these neighbourhoods.

2.4.1 Stability will be maintained by preserving the scale of the neighbourhood, routing future principal streets around rather than through them, and allowing commercial expansion within definite confines which will not conflict with the character or stability of the neighbourhood, and this shall be accomplished by Implementation Policies 3.1 and 3.2 as appropriate.

2.4.2 The City shall use the definition of "hard areas", as described in the official City of Halifax report entitled Areas for Detailed Planning, July, 1977, to aid in the definition of stable neighbourhoods for land use control purposes. Map 2 indicates those areas which have been defined as "hard".

...

2.5.3 Detailed area plans may deviate from the boundaries shown on Map 3 when justified to accommodate a neighbourhood's characteristics or at the request of the residents of the area.

...

2.8 The City shall foster the provision of housing for people with different income levels in all neighbourhoods, in ways which are compatible with these neighbourhoods. In so doing, the City will pay particular attention to those groups which have special needs (for example, those groups which require subsidized housing, senior citizens, and the handicapped).

SCHEDULE II.I

SOFT AREAS OUTSIDE AREAS DESIGNATED FOR DETAILED PLANNING

...

13. Area bounded by Richmond and Barrington Streets, and Devonshire Avenue.

...

8. ENVIRONMENT

OBJECTIVE

The preservation and enhancement, where possible, of the natural and man-made environment, and especially of those social and cultural qualities of particular concern to the citizens of Halifax.

...

12. CITIZEN PARTICIPATION

OBJECTIVE

Citizen participation as a necessary part of all planning processes within the City, in forms to be developed in consultation with the community.

...

12.4 The City shall develop procedures for consulting with the public on decisions which will affect the planning or development of the City. These procedures shall pay particular attention to the timing of public access to information, the methods for providing it, and the need of individuals and groups to have an adequate time period for review prior to final City Council decisions.

12.5 The City shall encourage citizens to make written submissions on planning issues or items of neighbhourhood concern (for example, development proposals, rezoning issues). These briefs will, if possible, accompany staff reports to City Council, but in any case shall be submitted to Council for their information.

12.6 The City shall encourage, where necessary, the formation of neighbourhood service and resource facilities which would facilitate awareness and articulation of neighbourhood concerns. The City shall encourage the coordination of existing services and organizations to ensure that citizens will be best able to understand and utilize available resources.

13. GENERALIZED FUTURE LAND USE MAP

13.1 Map 9 shall be considered as the expression of intent of the City of Halifax for a future land use pattern based on the policies outlined heretofore.

...

IMPLEMENTATION POLICIES

ZONING

...

3.1 In accordance with Part II, Section II, Policy 2.4.2 of this Plan, the City shall adopt the aforesaid present provisions and zoning schedules of the City of Halifax for all "hard" areas, substantially as shown on Map 2, Section II of this Plan, which are located outside areas designated for detailed planning as shown on Map 3, Section II of this Plan.

3.1.1 The City shall review all applications to amend the zoning bylaws or the zoning map in such areas for conformity with the policies of this Plan with particular regard in residential areas to Section II, Policy 2.4.

...

3.7.1 The City should from time to time review the zoning bylaws of the City to seek ways in which they may be brought into greater harmony with this plan.

...

3.14 Pursuant to the authority of the Planning Act, the Land Use Bylaw shall allow for the replacement of deteriorated portions of structures containing non-conforming uses, provided that such replacement does not result in any increase in the habitable volume of the structure.

...

AMENDMENTS TO THE ZONING BY-LAW

4. When considering amendments to the Zoning Bylaws and in addition to considering all relevant policies as set out in this Plan, the City shall have regard to the matters defined below.

4.1 The City shall ensure that the proposal would conform to this Plan and to all other City bylaws and regulations.

...

CITY OF HALIFAX LAND USE BY-LAW

EXCERPTS FROM EXHIBIT C-7, as of January 14, 1988.

PENINSULA AREA

...

DEFINITIONS

...

(m) "Dwelling" shall mean any building or portion thereof which is designed or used for residential purposes.

...

GENERAL PROVISIONS

2(2) No person shall undertake a development without first obtaining a development permit.

...

3 No person shall erect, construct, alter or reconstruct any building ..or use any land or building within any district without complying with the provisions of this Bylaw applicable thereto.

4 Nothing in this Bylaw shall operate to relieve any person of the obligation to obtain any license, permission, permit, authority, or approval required by this or any other Bylaw of the City.

10(1) Every building hereafter erected shall be located on a lot as herein defined and in no case shall there be more than one building on one lot, except as otherwise provided in the Bylaw.

...

10(3)(iii) the regulations respecting front, side and rear yards contained in Sections 35 to 43C inclusive shall apply to each building, such regulations to be applied as if the lot were subdivided into as many sublots as there are buildings, and the regulations for each building are applied to its respective sublot;

(iv) the distance between each of the buildings shall not be less than 10 feet; and

(v) the minimum lot frontage and lot area shall be 60 feet and 6,000 square feet respectively.

...

12 An application to amend this Bylaw or modify any of the provisions of this Bylaw must be accompanied by a fee at the time of making such application which fee shall be

...
Amendment to the Land Use Bylaw $100.00

...

R-2 ZONE

GENERAL RESIDENTIAL ZONE

(SECOND-DENSITY RESIDENTIAL ZONE)

35(1) The following uses shall be permitted in any R-2 zone:

(a) R-1 uses as hereinbefore set out;

(b) semi-detached or duplex dwelling;

(c) buildings containing not more than four apartments;

(d) day nursery for not more than 35 children;

(e) a rooming or boarding house for not more than eight lodgers or boarders provided that no lodger or boarder shall exceed sixteen years of age;

(f) uses accessory to any of the foregoing uses.

ANDREWS v. DISTRICT OF EAST HANTS

PLANNING - L.U.B. AMENDMENT - WHETHER DECISION OF COUNCIL REASONABLY CONSISTENT WITH INTENT OF M.P.S. - R-2 TO C-2 ZONE- HIGHWAY COMMERCIAL ZONE - FLOODPLAIN ZONE - LOT - HIGHWAY FRONTAGE - ENVIRONMENTAL OPEN SPACE - "LOT" DEFINED IN L.U.B.- PLANNING ACT SS. 63 - EAST HANTS M.P.S. 2.3; P4-9; P-9-1; 6; P-9-1(a); GEN. FLUM.

This was a second hearing, following successful appeal of Board decision in Andrews v. East Hants, M.B.D. 6-B 691, to allow evidence of whether or not a portion of a lot should be rezoned from R-2 to C-2, a highway commercial use. That portion of the lot that abutted the highway and was Floodplain Low Potential (01) Zone and could not be rezoned under the M.P.S. to C-2. Back portion of the lot was R-2 suitable to rezone if it fronted on a highway.

HELD: Board allows appeal as Council's decision not reasonably consistent with the intent of the M.P.S.

The Board must determine whether or not Council's decision to rezone the portion of the property is reasonably consistent with the intent of the M.P.S. Implementation Policy P-9-1 requires the proposed development to be in conformity with all the municipal by-laws one of which is the L.U.B. The L.U.B. requires that in a C-2 Zone, the lot must front on a public street or a highway. The lot abuts both a highway and a street but the portion of the lot to be rezoned C-2 does not. Section 6 of the M.P.S. "Environmental Open Space" prohibits C-2 uses therein. The Board found no policy permitting C-2 land use on property within the Floodplain. The Board agrees the Municipality's position is a fair one given the existence of the Floodplain. The L.U.B. as worded does not allow the Municipality to achieve the result desired. The Board suggests the Municipality amend its M.P.S. and L.U.B. if it wishes to achieve the desired result here. Since the C-2 zoned land did not abut a highway the decision of Council could not reasonably be consistent with the intent of the M.P.S.

NOTE: Leave to Appeal granted. Appeal allowed. Rezoning decision confirmed "Municipality of the District of East Hants v. Andrews et al (1988) S.C.A. 01986 (unreported)".

NSMB-586-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Planning Act, Chapter 9, Statutes of Nova Scotia, 1983, as amended;

- and -

IN THE MATTER OF: An Appeal by **RUSS J. ANDREWS** from a decision of the Council of the Municipality of the District of East Hants amending the Land-Use By-law by amending an area in the Enfield/Elmsdale District Boundary from General Residential Single and Two Family (R2) Zone to Commercial Highway (C2) Zone on the application of **PIONEER PROJECTS LTD.**

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: RUSS J. ANDREWS, on his own behalf;

ROBERT CARRUTHERS, LL.B., for the Municipality of the District of East Hants;

TOM PARKER, for the Applicant, PIONEER PROJECTS LTD.

DECISION

The Supreme Court of Nova Scotia, Appeal Division, in Municipality of the District of East Hants v. Andrews et al, S.C.A. No. 01903, March 29, 1988, (unreported), set aside the Decision and Order of the Board which were dated December 17, 1987. The Appeal Division ordered that the matter be remitted to the Board for further hearing and consideration. The Court made the following comments:

"As can be seen from the decision, the matter of the

> rezoning of the floodplain zone and access to the lot over the floodplain zone had not been raised at the hearing and the municipality was not therefore in a position to meet this question. It may very well be that the rezoning applied for could be justified by restricting it to the part of the lot which would not include the 01 zone and permit access over that zone to the commercial zone.
>
> In our opinion, since this aspect of the matter was not argued before the Municipal Board, the decision and order of the Board should be set aside and the matter remitted to the Board for further evidence and consideration."

The Board held a hearing on May 20, 1988 and Brad Hodgins, Planning Co-Ordinator for the Municipality, was the main witness. At this further hearing it became clear that Council's decision was limited to rezoning that portion of the property which was zoned R2. The documents which had previously been presented to the Board showed that the entire subject property was to be rezoned including the portion that was zoned Floodplain Low Potential (01) Zone. The Municipality agreed with the Board that the portion of the subject property that is zoned Floodplain (01) Zone cannot be rezoned to Commercial Highway (C2) Zone. The Board's error was in interpreting Council's decision as rezoning the entire lot of land.

Before dealing with the issue addressed at the further hearing it is necessary that the Board summarize its original findings:

1. The Board held that it had jurisdiction to hear the appeal.

2. The Board made the following findings of fact:

"The subject property is located on the north side of

> Trunk Highway No. 2 close to the Elmsdale/Enfield District Boundary. The subject property is 60,500 square feet and is part of a larger lot owned by the Applicant. To the east of the property is Kali Lane, formerly Nova Road, which has been realigned and deeded to the Province. Immediately to the rear of the property is a home in which Mr. Parker's mother-in-law resides. Immediately to the west is a large lot and home owned by Robert Fisher. The Baptist Church is located next to the Fisher property. The Appellant's home is located approximately 200 yards east of the subject property. Another home is located between the appellant's home and the subject property. On the south side of Highway No. 2 there are a number of commercial and industrial uses. Airport Auto Sales is located across the highway from the Appellant's home. The majority of the land between Highway No. 102 and Trunk Highway No. 2 in the Enfield and Elmsdale Districts has been designated Residential Subdivision. Except for a large parcel which is zoned Industrial, and on which the Elmsdale Lumber Mill is located, there are very few other designations in this area except for lands designated as Environmental Open Space: Floodplain Low or High Potential. Most of the subject property is designated Residential Subdivision on the Generalized Future Land Use Map ("Gen. FLUM") and is zoned General Residential Single and Two Family (R-2) Zone. The Applicant applied for rezoning to Commercial Highway (C-2) Zone. The Applicant sought the rezoning with the intention of selling the land to Airport Auto Sales for the development of a car lot. An 800 square foot building is to be constructed on the site to be used as a car sales office and showroom."

3. The Board made the following comments on whether or not the Municipal Planning Strategy, (hereinafter referred to as the "M.P.S.") permitted land designated on the Gen. FLUM to be rezoned to Commercial Highway (C2) Zone:

> "While certain sections of the Planning Strategy appear to support Mr. Andrews' position that an area designated Residential Subdivision should not be rezoned Commercial, it is clear that other provisions in the Planning Strategy permit rezonings. Section 2.3 of the Planning Strategy sets out the guidelines for the application of the Gen. FLUM designations and states that in most cases the zone "reflects the existing land uses, which are predominantly residential and the transition to commercial land uses is done

> through a zoning amendment." Policy P4-17 provides as follows:
>
> "It shall be the intention of council to permit Commercial Highway (C2) development less than 15,000 square feet floor area, within the Gen. FLUM designations "commercial, Industrial, Residential Subdivision and Rural Residential and Natural Resource", by Land-Use By-law amendment, provided outdoor storage and display is adequately screened from abutting residential and special use land uses and provided the rezoning criteria of Section 9 P9-1 are satisfied."
>
> The Planner was satisfied that the criteria of Policy P9-1 was satisfied."

4. The Board then went on to deal with the issue of the Environmental Open Space: Floodplain Low Potential (O1) Zone and held that the rezoning did not carry out the intent of the M.P.S.

In its original decision the Board did not discuss the issue of buffering. In the Planner's Report, Mr. Hodgins strongly recommended that a fence or screen be used as buffering between the subject property and the residential property to the west. Policy P4-9 requires Commercial Highway land uses involving outdoor display to adequately fence or screen the display area when it abuts any Residential Zone. The Land-use By-law ("L.U.B.") also provides that under the Commercial Highway (C2) Zone, no outdoor display (which would include motor vehicles which are for sale) is permitted where a C2 Zone abuts a Residential Zone unless the abutting yard is fenced or screened. If motor vehicles are also displayed at the rear of the subject property then a fence or screen will be required there as well as on the west side. Policy P-9-1 requires buffering to reduce potential incompatibility with adjacent land uses and traffic arteries. In order to satisfy this requirement, there must be adequate buffering on the east side of the subject property to reduce the incompatibility with the homes of Mr. Andrews and his neighbours.

The Board must determine whether or not Council's decision to rezone the portion of the property which was zoned R2 is reasonably consistent with the intent of the M.P.S. in accordance with Section 63 of the Planning Act. In making that determination the Board must consider the relevant sections of the L.U.B. since Implementation Policy P9-1 requires that a proposed development be in conformance with all Municipal By-laws. One of the specific requirements of the L.U.B. is that in the Commercial Highway (C2) Zone, the lot must abut or front a public street or highway. Part 6, Section 4 of the L.U.B. is as follows:

> "4. Subject to Section 31, Variations to Lot Frontage of this Part, no development permit shall be issued unless the lot or parcel of land intended to be used, or upon which the building or structure is to be erected, abuts or fronts upon a public street or highway, a private road, or a right-of-way indexed in Schedule B of the Subdivision By-law."

Section 31 permits variations for lots which do not abut a public street or highway except where

> (ii) the lots are zoned Commercial General (C1), Commercial Highway (C2)..."

In this case the subject property does abut both a highway and a public street but the portion of the property which is being rezoned does not abut the street or highway. Mr.

Hodgins in his testimony referred the Board to the definition of "Lot" and "Lot Frontage" in the L.U.B. and stated that it was not necessary that the actual portion of the land which was being rezoned abut a highway or public street so long as it was part of a lot which did. Part 15 of the L.U.B. which contains the requirements of the Commercial Highway (C2) Zone sets out certain minimum requirements which Mr. Hodgins agreed must be met within the part of the property which is zoned Commercial Highway (C2) Zone.

Mr. Carruthers, Counsel for the Municipality, took the position that the Municipality was aware of the floodplain situation which runs along Highway No. 2 and intended to permit rezonings even where the property fronting the highway was within the floodplain zone, provided that the portion of the land that was capable of being rezoned was large enough to fulfill the requirements of the L.U.B.

The Policies in Section 6 of the M.P.S. deal with Environmental Open Space. Allowance is made for existing uses on lands which are now designated Environmental Open Space. There is a specific prohibition against Commercial Highway and other land use developments within those lands which are designated on the Gen. FLUM as "Environmental Open Space-Floodplain Low Potential". The Board could find no policy which dealt with the issue of permitting a Commercial Highway land use on property where the area which abuts the highway is within the floodplain.

Since the M.P.S. does not appear to deal with this situation it is necessary to examine the L.U.B. and determine whether the sections can be interpreted to support the Municipality's position. The following definitions must be considered:

> "Lot means any parcel of land described in a deed or described in a plan and deed pursuant to the Land Titles Clarification Act or as shown in an approved plan of subdivision filed in the Registry of Deeds.
>
> Lot Area means the total horizontal area within the lot lines of a lot.
>
> Lot Frontage means the horizontal distance between the side lot lines, such distance being measured perpendicularly to the line joining the middle of the front lot line with either the middle of the rear lot line or the apex of the triangle formed by the side lot lines and at a point therein equal in distance to the minimum applicable front yard. In the case of a corner lot with a daylighting triangle the exterior lot lines (street lines) shall be deemed to extend to their hypothetical point of intersection for the purpose of calculating the frontage.
>
> Lot Line means a boundary or exterior line of a lot.
>
> Front Lot Line means the line dividing the lot from the street, and includes the following variations;...
>
> Yard means an open, uncovered space on a lot appurtenant to a building (except a court) and unoccupied by buildings or structures except as specifically permitted elsewhere in this by-law. In determining yard measurements, the minimum horizontal distance from the respective lot lines shall be used.
>
> a) Front Yard means a yard extending across the breadth of a lot between the front lot line and the nearest main wall of any main building or structure on the lot; and required front yard means the minimum depth of a front yard on a lot between the front lot line and the nearest main wall of any building or structure on the lot."

The C-2 requirements set out in Part 15 are as follows:

"3. C2 REQUIREMENTS

Minimum Lot Area: 1 acre
Minimum Lot Frontage: 175 feet
Minimum Front Yard 40 feet
Minimum Side Yard: (each side) 20 feet
Minimum Rear Yard: 40 feet
Maximum Height of Main Building: 35 feet
Maximum Floor Area: 15,000 square feet
Parking for stores as provided in Section 2, Part 6."

It should be noted that area which Council rezoned clearly meets the minimum acreage and feet requirements of the C2 Zone.

The question which must be determined is whether or not the portion of land which is being rezoned must abut a public street or highway. If it must, then the rezoning cannot be permitted since the area which Council rezoned does not abut or front upon a public street or highway.

The Board has difficulty in maintaining that there can be a distinction between the "Lot" and the area to be rezoned when it comes to the question of the meaning of "Lot Area" since it is described in terms of lot lines which are defined as boundary or exterior lines and the front line is specifically defined as meaning the line which divides the lot from the street. Surely the use of the term "Minimum Lot Area" in the C2 Zone must be defined in the same manner as "Lot Area" and therefore include the exterior or boundary lines of the lot.

While the Board recognizes that the calculations which can be made under the definition of "Lot Frontage" may permit a rezoning which might otherwise not meet the minimum requirement for a lot frontage, the Board cannot see how that calculation changes the requirement that a lot zoned commercial must abut a public street. Section 31 of the L.U.B. refers to lots "zoned Commercial General (C1), Commercial Highway C2...", it does not refer to portions of lots which are zoned Commercial.

While the Board agrees that the position taken by the Municipality is a fair one given the existence of the Floodplain, the Board does not believe that the L.U.B. as worded at present achieves the desired result. In order to uphold the Municipality's position, the word "Lot" must be given more than one meaning within the L.U.B. When a word is specifically defined in the definition section there needs to be a clear intention shown that the word is to have more than one meaning. Such a clear intention is not shown here.

In the Board's opinion, the L.U.B. requires that the land which is being rezoned Commercial Highway (C2) Zone must abut a public street or highway and it is not sufficient that it be part of a lot which does abut. This situation might be corrected by an amendment to the M.P.S. or L.U.B. to make clear the intention to allow rezonings in a case such as this.

The Board finds that Council's decision is not reasonably consistent with the M.P.S. since the area of land which was rezoned Commercial Highway (C2) Zone does not abut a public highway and therefore does not comply with Implementation Policy P9-1(a). The Board allows the appeal and reverses the decision of Council.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 22nd day of June, A.D., 1988.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

MADER v. MUNICIPALITY OF THE COUNTY OF HALIFAX

PLANING - L.U.B. AMENDMENT - REFUSAL TO REZONE FROM R-1 TO P-2- WHETHER REASONABLY WITHIN THE INTENT OF THE M.P.S. - PROFESSIONAL OFFICE - INTERESTED PERSONS - UNDUE HARDSHIP - EXTRAORDINARY AND COMPELLING CIRCUMSTANCES - MUNICIPAL BOARD ACT SS. 27(4)- PLANNING ACT SS. 63; 63(7); M.P.S. SACKVILLE - P-30; P-32; P-53; P-54; P-104;

M, as agent applied to rezone one lot and rear of adjacent lot from R-1 to P-2 to permit house to be used as medical clinic. Land designated Urban Residential on Gen.FLUM.

HELD: The Board dismissed appeal.

"Air of mystery" surrounds proposal put to P.A.C. and Council at public hearing. Although Board cleared any mystery away at the hearing, a lack of knowledge might have affected Council's decision. Concern of lack of disclosure was expressed at the public hearing. A rezoning application is based to a certain extent on trust. Implementation Policy P-104 sets out criteria by which Council must test rezoning proposal. Parking was not provided for in the proposal. Policy P-2 not to force Council to give automatic approval to rezoning to P-2 but to review each proposal on its merits. Intent of M.P.S. to permit P-2 rezoning in appropriate locations to "conveniently serve the public in the general residential area". Location is close to the commercial core. There is inadequate separation distance. It is not inconsistent with the intention of the M.P.S. for Council to refuse the rezoning.

There is some question as to the status of M as an applicant appellant. No undue hardship to the Applicant or any extraordinary or compelling circumstances.

NSMB-602-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S., 1983, C. 9, by **BEAUFORT MADER** from a decision of the Municipality of the County of Halifax made November 9, 1987, which refused to amend the Municipality's Land Use By-law for Sackville by rezoning property located at Civic Number 11, Beaverbank Road, Sackville, from R-1 (Single Unit Dwelling) Zone to P-2 (Community Facility) Zone.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: ROBERT NEWMAN, LL.B., for the Appellant;

ROBERT G. CRAGG. LL.B., for the Municipality of the County of Halifax;

ROY WEAGLE, for the Interested Persons.

HEARING DATES: April 11, 1988;
June 14, 15, 1988.

DECISION DATE: June 24, 1988.

DECISION: **Appeal Dismissed.**

DECISION

Doctor Rosemarie Taylor has practiced family medicine and obstetrics in the Sackville area for a number of years. She conducted a survey of where her 1800 to 2000 patients lived and determined that 11 Beaverbank Road, the subject property, represented the centre of her practice. She entered into negotiations with Noel Feetham, the owner of 11 and 13 Beaverbank Road to purchase number 11 and the rear portion of number 13. These are both residential properties which are zoned R-1 (Single

Unit Dwelling) Zone.

The subject property is located on the east side of the Beaverbank Road, 5 properties north of Sackville Drive. It is approximately 10,973 square feet with a 71-foot frontage on the Beaverbank Road. The rear yard abuts the rear yard of properties on Dorothy Drive which is also zoned R-1. Directly opposite the subject property is the intersection of Judy Avenue and Beaverbank Road. The properties on the west side of the Beaverbank Road running north from Judy Avenue are zoned R-1 as well. The area between Judy Avenue and Sackville Drive on the west side of Beaverbank Road is zoned P-2 (Community Facility) Zone. St. John Vianney Church, a fire hall and the Church Day Care are located on this block. Other than this block, the area surrounding the subject property is zoned R-1 and contains single family homes.

At some point Dr. Taylor engaged Beaufort Mader, the Appellant, to act on her behalf in applying for a rezoning of 11 Beaverbank Road from R-1 (Single Unit Dwelling) Zone to P-2 (Community Facility) Zone to permit the property to be used as a medical clinic. He applied in his own name for the rezoning on July 21, 1987. On October 30, 1987, Dr. Taylor took possession of 11 Beaverbank Road. A public hearing on the rezoning application was held on November 9, 1987, following which Council refused the application to rezone. On November 27, 1987 Dr. Taylor relocated her medical practice to the subject property. On that same day Beaufort Mader filed his Notice of Appeal with the Board. On December 9, 1987, Dr. Taylor applied for a development permit to operate a medical practice in the R-1 zone. On March 16, 1988, a development permit was issued which permitted a business use of not more than 300 square feet to be carried on at 11 Beaverbank Road provided that this was the "principle" [sic] residence of Dr. Taylor. Dr. Taylor testified that although she is at present operating within the 300 square feet it is not sufficient to provide adequate space for her two receptionists and the waiting room. In addition she wishes to open a second examining room to increase efficiency.

During the course of the hearing it became clear that Dr. Taylor is in the process of buying the vacant back portion of 13 Beaverbank Road which is approximately 32 feet by 70 feet. At present, her two receptionists are parking their vehicles on this lot which is immediately adjacent to the parking lot at the rear of the subject property. Number 13 Beaverbank Road has been subdivided and although negotiations to purchase the back portion were commenced at the same time as those respecting the subject property, the closing was delayed pending the completion of certain conditions, including the building of a fence. The Board was advised that this property transaction will be closing in the near future. It appears that this additional lot is intended to be used to provide the necessary parking spaces required under the L.U.B. for a second examination room if the rezoning is approved.

The appeal to this Board was originally scheduled for

April 11, 1988, but due to the Appellant's failure to properly serve the Notices of Hearing and the Appellant's delay in engaging of counsel (a few days before the hearing) it was adjourned to June 14, 1988.

On April 11, 1988, the Board determined that Roy Weagle and those he represented, all persons living in the vicinity, had a real and substantial interest in the appeal and therefore he was permitted to participate in the proceedings pursuant to Section 27(4) of the Municipal Board Act. Mr. Weagle was not assisted by counsel and the Board was very impressed with the manner in which he conducted himself.

The various witnesses identified four relevant policies in the Municipal Development Plan for Sackville ("M.P.S.") and they are as follows:

> "P-30 Within the Urban Residential Designation it shall be the intention of Council to establish a residential zone which gives priority to single unit dwellings and to most community facilities. In addition, the zoning by-law shall provide for limited business use of a dwelling provided that the use is compatible with the existing residential environment.
>
> P-32 Notwithstanding Policy P-30, within the Urban Residential Designation Council, may consider medical clinics, fraternal halls and any day care facility which is too extensive be accommodated as a small business in a dwelling, by amendment to the zoning by-law. In considering such amendments Council shall have regard to the following:
>
> (i) the adequacy of the location relative to serving the needs of the local population;
>
> (ii) the accessability of the use via local and collector streets;
>
> (iii)the adequacy of separation distances from adjacent residential uses;

(iv) the guidelines of provincial licensing requirements; and

(v) the provisions of Policy P-104.

P-53 It shall be the intention of Council to encourage the development of a commercial core in Sackville with a mixture of retail and comparison shopping, government and general offices, open space, residential and community facility uses, and supportive financial, entertainment and cultural facilities.

P-54 With reference to Policy P-53, it shall be the intention of Council to establish a commercial Core Designation as shown on the Generalized Future Land Use Map (Map 1) and a commercial core zone in which commercial, retail and multiple residential uses; existing residential development and community facilities shall be permitted.

P-104 In considering amendments to the zoning by-law or development agreements, in addition to all other criteria as set out in various policies of this Plan, Council shall have appropriate regard to the following matters:

(i) that the proposal is in conformity with the intent of this Plan and with the requirements of all other municipal by-laws and regulations;

(ii) that the proposal is not premature or inappropriate by reason of:

a) ...

(not applicable)

e) ...

(iii) that controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of:

a) type of use;

b) height, bulk and lot coverage of any proposed building;

c) traffic generation, access to and egress from the site, and parking;

d) open storage;

e) signs; and

f) any other relevant matter of planning concern.

(iv) that the proposed site is suitable in terms of steepness of grades, soil and geological conditions, locations of watercourses, potable water supplies, marshes or bogs and susceptibility to flooding."

Also referred to were Part 6: R-1 (Single Unit Dwelling) Zone, and Part 17: R-2 (Community Facility) Zone of the Land Use By-law for Sackville ("L.U.B.") which read in part as follows:

"6.1 R-1 USES PERMITTED

No development permit shall be issued in any R-1 (Single Unit Dwelling) Zone except for the following:

Residential Uses

Single unit dwelling;
Existing mobile home parks;
Day care facilities for not more than fourteen (14) children and in conjunction with permitted dwellings;
Business uses in conjunction with permitted dwellings.

Community Uses

Open space uses;
Institutional uses except day care facilities, medical clinics and fraternal centres and halls.

17.1 P-2 USES PERMITTED

No development permit shall be issued in any P-2 (Community Facility) Zone except for the following uses:

Institutional Uses

Educational institutions and uses;
Denominational institutions and uses;
Day care facilities;
A single dwelling unit in conjunction with a daycare facility;

Fire and police stations;
Government offices and public works;
Hospitals and medical clinics;
Public libraries, museums and galleries;
Fraternal centres and halls;
Community centres and halls.

Open Space Uses

Public and private parks and playgrounds;
Recreation uses;
Cemeteries;
Day camps;
Historic sites and monuments."

The Board believes that Implementation Policy P-103 is also relevant and it provides in part as follows:

> "The following uses shall only be considered by amendment to the zoning by-law and:
>
> (i) within the Urban Residential Designation,
>
> (g) fraternal halls, medical clinics and certain day care facilities according to Policy 32."

The subject property is designated Urban Residential on the Generalized Future Land Use Map. While there was some discussion at the hearing whether or not what Dr. Taylor is proposing is a medical clinic, it is not necessarily to decide the issue and the Board will assume that it is a medical clinic for purposes of this Appeal.

There was also some discussion at the hearing as to whether or not 11 Beaverbank Road is Dr. Taylor's principal residence. The Board does not need to concern itself with this issue other than to point out that it is a requirement within the R-1 Zone. The L.U.B. permits business uses of a limited size in conjunction with permitted dwellings in the R-1 Zone. In addition certain institutional uses are permitted within the R-1 Zone. These do not include "day care facilities, medical clinics and fraternal centres and halls".

Part 17 of the L.U.B. sets out the permitted uses in the P-2 (Community Facility) Zone and contains a list of institutional uses including hospitals, public libraries, churches, fire and police stations which would be permitted in an R-1 Zone without a rezoning. In the Board's opinion, the fact that certain institutional uses are permitted within the R-1 has no bearing on this appeal. In order for Dr. Taylor to operate a medical office larger than 300 square feet, the subject property must be zoned P-2 Zone.

The main issue for the Board is whether Council's refusal to rezone the subject property is reasonably consistent with the intent of the M.P.S. in accordance with Section 63 of the Planning Act.

Policy P-30 establishes a mandatory priority of single unit dwellings and certain community facilities, excluding medical clinics, in the R-1 Zone. It also permits limited business uses of a dwelling.

Policy P-32 allows Council to consider a rezoning for medical clinics providing certain matters are considered including the requirements of Implementation Policy P-104. In the Board's opinion, Council must also take into account Policies P-53 and P-54 which call for the inclusion of community facility uses within the commercial core. In this case, the subject property is only five properties north of the outer boundary of the commercial core.

The Staff Report which was prepared in advance of the Planning Advisory Committee and which was included in Exhibit M-1 does not refer specifically to any of the policies in the M.P.S. It does attempt to summarize what the author felt were the main criteria. This is an approach which the Board has objected to in the past. It is preferable if the Staff Report specifically addresses all the relevant policies and comments on their applicability to the case at hand. This ensures that Council is aware of all the policies that they are required (in the Planner's opinion) to consider and in the event of an appeal provide a clear indication to the Board of the policies which were considered.

In this case, the Staff Report makes no mention of clause (iii) of Policy P-32 which reads as follows:

> "(iii) the adequacy of separation distances from adjacent residential uses;"

There are driveways on either side of the property which run from the boundary line to the house. The driveway on the northern side of the subject property runs very close to the house on the lot at 13 Beaverbank Road. In the Board's opinion a narrow driveway cannot be considered an adequate separation distance between residential uses and a medical clinic which generates on average 40 patients a day.

The Staff Report does make reference to the fact that parking may be a problem if a second consulting or examination room is added. The following statement is included in the report:

> "The Applicant [Beau Mader] has stated in the immediate future, the clinic would contain only one consulting room".

At the hearing, Dr. Taylor made it very clear that it is her intention to add a second consulting room if the rezoning is granted. The acquisition of the rear portion of 13 Beaverbank Road is presumably intended to provide the additional parking required by the L.U.B. for a second consulting room.

The Minutes of the Public Hearing do not indicate the specific reasons why Council voted to refuse the application to rezone although there is reference to one Councillor stating that "Dr. Taylor can move in to the property and operate her business from there." There were members of the public, including Mr. Weagle, who spoke against the rezoning and a petition of residents opposed was submitted by Mr. Weagle.

There is one issue which has troubled the Board - the apparent air of mystery which has surrounded this rezoning. For example, the Clerk of the Board was unable to determine who was the owner of the subject property in preparing the Notice of Hearing. Neither the application nor the Notice of Appeal mentioned Dr. Taylor's name, nor was it indicated that Mr. Mader was acting as Dr. Taylor's agent. It was not disclosed to County staff or others that Dr. Taylor was the intended purchaser of 11 Beaverbank Road or that she was negotiating to buy a portion of 13 Beaverbank Road to use for parking. Re-zoning will be required for this lot as well if Dr. Taylor wishes to use it in conjunction with the proposed use of 11 Beaverbank Road. There is also the discrepancy mentioned above regarding the number of consulting rooms. The Board does not know if this "air of mystery" was deliberate or not. Certainly at the Board's hearing all the relevant evidence was forthcoming. It appears to the Board that one of the concerns of the neighbours was the lack of knowledge of who was involved and what the real intentions were. This concern was raised at the Public Hearing and may have had an impact on Council.

A rezoning application is based to a certain extent on trust. Council is asked to grant a rezoning based on a specific proposal. Implementation Policy P-104 requires that the proposal be considered in terms of the various criteria, including what controls are placed on the proposed development to reduce conflicts with adjacent or nearby land uses. Where an Applicant does not fully disclose his or her intentions it is difficult for Council to be satisfied that it is an appropriate case for rezoning. Without knowledge of the intention to purchase the extra lot, Council was no doubt concerned that parking might be placed on the front yard which would conflict with the adjacent residential uses. In addition, the separation distances are minimal given the increased traffic to and from the subject property that would likely result with a rezoning of the subject property to P-2.

In the Board's opinion, the intention of Policy P-32 is not to force Council to give automatic approval of requests to rezone to P-2 but to review each proposal on its own merits. It appears to the Board that the intent was to permit such rezonings in appropriate locations to "conveniently serve the public from in the general residential area" (M.P.S. page 31). In this situation where the location is very close to the commercial core and where there are inadequate separation distances, it is not inconsistent with the intent of the M.P.S. for Council to refuse the rezoning.

Section 63(7) of the Planning Act provides that the Board may allow an appeal by "an applicant" if, in the opinion of the Board, the applicant would suffer undue hardship or there are extraordinary or compelling circumstances. The Board raised a concern whether this section applied given that Beau Mader was both the Applicant and the Appellant. Leaving that issue aside, in the opinion of the Board, Dr. Taylor will not suffer undue hardship nor are there compelling or extraordinary circumstances present. Dr. Taylor may continue to operate her medical practice from 11 Beaverbank Road and although the quarters may be cramped for the receptionists and patients and it may not be as efficient as Dr. Taylor would like, these factors are not sufficient for the Board to overturn Council's decision.

The appeal is dismissed and an Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 24th day of June, A.D., 1988.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

WALLACE v. TOWN OF TRURO

PLANNING - L.U.B. AMENDMENT - REFUSAL TO REZONE FROM R-6 TO R-3- WHETHER CONSISTENT WITH THE INTENT OF M.P.S. - RESIDENTIAL RURAL TO RESIDENTIAL MEDIUM DENSITY ZONE - APARTMENT BUILDINGS- INTERESTED PERSONS - PLANNING ACT SS. 63(5); MUNICIPAL BOARD ACT SS. 27(4); TRURO M.P.S. POLICIES P-208; P-211; P-212; P-266; P-203(a); P-204(b); P-501.

W applied to rezone 5.5 acres from R-6 to R-3 to permit construction of several low rise apartment buildings. This land had been subject to a prior rezoning application see Benedict v. Town of Truro (1985) 4-B MBD 291. The neighbours objected to the proposed rezoning.

HELD: The Board dismissed the appeal and confirmed the decision of Council.

Council must consider the approval under the various M.P.S. criteria. It must not place undue emphasis on the worst case scenerio. A rezoning application is based to a certain extent on trust. If applicant radically changes the development once approved, future applications may be affected. Promissory estoppel may apply to planning matters.

Council gave policy reasons for its refusal. The Board's role is not to impose its own view but to determine whether or not Council's decision is reasonably consistent with the intent of the M.P.S. In such matters Council has a discretion which it must exercise reasonably in the context of the M.P.S.

The Board, taking into account the opinion of the experts, must make its own interpretations of the various policies of the M.P.S. The Board disavowed specifically Mr. Birch's expert opinion that Policy P-12 was mandatory in the sense that if all requirements therein were met then Council must grant the rezoning.

Interested persons objected to repeated applications to rezone the same lands. They argued that nuisance factor could be considered by Council in coming to its decision. The Board felt there was no mechanics to prevent a developer from reapplying. It expected that subsequent applications following a refusal would incorporate features making the proposal more attractive to the residents.

No undue hardship or unusual or compelling circumstances exist. The fact of three failures to rezone the property does not in itself meet the definition of undue hardship.

NSMB-601-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S., 1983, c. 9, by **RON WALLACE** from a decision of the council of the **TOWN OF TRURO**, made November 2, 1987, which refused to amend the Town of Truro's Land Use By-law by rezoning lands on the east side of Young Street from Residential Rural (R-6) Zone to Residential Medium Density (R-3) Zone.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: PETER McLELLAN, LL.B., for the Appellant;

DAVID GRUCHY, Q.C., for the Town of Truro;

PETER ROGERS, for the Interested Persons, GORDON KINSMEN, DONALD G. MacNEIL and PHILLIP R. MOIR.

HEARING DATES: March 28, 1988,
May 11, 12, 1988.

BRIEFS SUBMITTED: June 1, 1988 - Town, Interested Persons
June 3, 1988 - Appellant
June 16, 1988 - Appellant's Rebuttal.

DECISION DATE: July 15, 1988.

DECISION: **Appeal Dismissed.**

DECISION

The Appellant, **RON WALLACE**, is a contractor and landlord in Truro. He has built new apartment buildings and remodelled older buildings and at present has 106 rental units in

21 buildings in the Truro area. In early 1985 he applied to the Truro Town Council for a rezoning of two lots of land on Young Street (one on the east side, one on the west) to Residential Medium Density (R-3) Zone. The Town Council allowed the rezoning but on appeal to this Board, Council's decision was overturned: Benedict v. Town of Truro (1985) 4-B M.B.D. 291.

In 1986 Mr. Wallace applied again for a rezoning of an area of land located on the east side of Young Street. This application did not include the lot on the west side of Young Street as had the earlier application. At the Public Hearing in March 1986, Mr. Wallace withdrew the application.

On July 13, 1987, Mr. Wallace wrote to Town Council requesting a rezoning of 5.5 acres of land on the east side of Young Street from Residential Rural (R-6) Zone to Residential Medium Density (R-3) Zone to permit the construction of a number of low rise apartment buildings. The property is the same property for which rezoning was requested in 1986.

The subject property runs from Young Street to the Lewis Road which borders on the western boundary of Victoria Park and extends along the east side of Young Street from north of the intersection of Beechwood Drive and Young Street to south of the intersection of Glenwood Drive and Young Street. Both Beechwood Drive and Glenwood Drive are streets in the Westmount Park Subdivision which is an area that is zoned Residential Medium Density Zone (R-2) and is largely developed as single family homes. At present the subject property is vacant land without tree cover. The land slopes down from Young Street to Victoria Park.

The Board was satisfied that three individuals who reside in the neighbourhood adjacent to the subject property have a real and substantial interest in the appeal and they were designated as "Interested Persons" with the right to participate in the hearing pursuant to Section 27(4) of the Municipal Board Act.

The hearing commenced on May 11, 1988 and much of the evidence related to the interpretation of the relevant policies of the Municipal Planning Strategy ("M.P.S."). Counsel for the Appellant called Keith Birch, a former Director of Planning and Development for the County of Halifax, who was qualified to give opinion evidence respecting planning matters. Peter Nelson, Town Planner and Development Officer for the Town of Truro, was also called as an expert witness on planning matters by the Appellant. The Appellant testified as well. The Town called no evidence. Mr. Rogers, on behalf of the Interested Persons, called Sally Erskine Doucette, a market analyst with C.M.H.C. who was qualified as an expert in rental market analysis in Nova Scotia. The three Interested Persons, Gordon Kinsmen, Donald G. MacNeil, Phillip R. Moir and another resident in the area, Paul Eaton, testified as well.

Evidence was lead with respect to the vacancy rate in Truro and the existence of a demand for medium density uses. Mr. Wallace testified that he has only three vacancies out of 106 units and that there are fewer vacancies in areas which are close to the centre of town and he believes that the subject property is close to the centre of town. Mr. Nelson referred to the statistics which are included in Appendix "B" of the M.P.S. which show the projected growth in various housing units until 1991. He felt that although these projections had not been met the County had been growing and that a demand for rental accommodation did exist. He noted that the Board had referred to a vacancy rate of 5% in Benedict but it was in fact 0.5%.

Ms. Erskine Doucette introduced the C.M.H.C. Rental Market Survey for April 1987 and October 1987 which showed the rental vacancy rates for Truro and the surrounding communities. She testified that following discussions with Mr. Nelson she did a manual calculation of the rate for the Town of Truro and found it to be approximately 7% in October, 1987. This is higher than the rates for both the Kentville area (5.3%) and New Glasgow area (5.7%) for the same period. The report states that in Truro, "the vacancy rate has a direct relationship to the size of the structure, as larger projects tend to have higher vacancy".

Under Section 63(5) of the Planning Act the Board may only allow an appeal where it determines that Council's decision does not reasonably carry out the intent of the municipal planning strategy. The Minutes state that Council's motion to refuse the rezoning was on the basis of Policies P-501, 211 and 212. There are a number of other policies in the M.P.S. which must be considered and the following is a summary of these other policies with the Board's comments:

(a) P-203(a) provides that Council will designate on the Future Land Use Map areas of medium to high density residential development. The purpose of this policy is to encourage medium to high density residential uses in and around the downtown area. The subject property has not been designated medium to high density.

(b) P-204(b) provides for medium to high density residential uses by development agreement in revitalization area I and there is no other policy which would permit the use of a development agreement for the subject property. The subject property is not within revitalization area I.

(c) P-208 provides for the encouragement of residential development by use of the plan and whatever other means possible. While this policy encourages residential development, it does not mandate any specific form of residential development. Council still has a discretion whether or not to encourage a specific development.

(d) P-263 requires Council to support the Parks and Recreation Commission in the acquisition of larger parks or recreation sites where a need is established. This policy was referred to by the Board in the Benedict decision. There is no suggestion that the Parks and Recreation Commission is considering acquiring the subject property for use as a park or recreation site. There was evidence, however, of a need for a recreation site in the area.

(e) P-266 makes it a policy for council to "acquire further access to Victoria park". This is clearly a policy which Council must consider when it is asked to rezone a 5.5 acre site which borders on Victoria Park.

Before discussing Policies P-211, P-212 and P-501 it will be helpful to set them out in full. They provide as follows:

> " Therefore, it shall be a policy of Council to:
>
> P-211 Administer this plan and corresponding Zoning By-law in a judicious and expedient manner to curtail illegal land uses and to ensure a sense of security in Town.
>
> Therefore, it shall be a policy of Council to:
>
> P-212 Permit by zoning amendment medium density residential uses in low density residential areas as indicated on the Future land Use Map provided:
>
> - that there is 2 or more hectares involved, and
> - that the area is abutting or has independent access to a collector or arterial street.
>
> Therefore, it shall be a policy of Council to:
>
> P-501 In considering amendments to the Zoning By-law, in addition to all other criteria as set out in various policies of this Plan, Council shall have regard to the following matters:
>
> (a) That the proposal is in conformance with the intents of this Plan and with the requirements of all other Town By-laws and regulations;
>
> (b) That the proposal is not premature or inappropriate by reason of:

(i) the financial capability of the Town to absorb any costs relating to the development;
(ii) the adequacy of sewer and water services and utilities or if services are not provided, the adequacy of physical site conditions for private on-site sewer and water systems;
(iii)the adequacy and proximity of school, recreation, and any other community facilities;
(iv) the adequacy of road networks in, adjacent to, or leading to the development;
(v) the potential for the contamination of watercourses or the creation of erosion or sedimentation;
(vi) creating a leap-frog, scattered or ribbon development pattern as opposed to compact development.

(c) That controls are placed on the proposed development so as to reduce conflict with any other adjacent or nearby land use by reason of:
(i) type of use;
(ii) emissions including air and water pollutants and noise;
(iii)height, bulk, and lot coverage of the proposed building;
(iv) traffic generation, access to and egress from the site, and parking;
(v) open storage;
(vi) signs;
(vii)similar matters of planning concern.

(d) Suitability of the proposed site in terms of steepness of grades, soil and geological conditions, location of watercourses, marshes, swamps, or bogs and proximity of highway ramps, railway right-of-ways and other nuisance factors.

(e) Provisions for buffering, screening and access control to reduce potential incompatibility with adjacent land uses and traffic arteries."

With respect to Policy P-212 the subject property meets the requirements in that at least two hectares in one contiguous lot are involved and it abuts an arterial street, Young Street. In the Benedict decision, the Board placed an emphasis on the words "based on demand" which occur in the preamble to Policy P-

212. The Board held that a demand for medium density uses had not been established. At the current hearing, evidence was led as to the meaning of these words as well as the evidence of the existence or non-existence of a demand for medium density uses noted above. Both Mr. Nelson and Mr. Birch took the position that the words "based on demand" meant when an applicant requested a rezoning. An examination of the preamble indicates that this is a possible interpretation. It is stated that there has been and still exists considerable demand for medium density land uses within undeveloped low density residential area and that rather than prezoning the land, Council should consider rezoning "based on demand" which can be interpreted as "when requested". If we accept this interpretation, however, it merely requires Council to consider the request. It does not make it mandatory that Council approve the rezoning.

If, on the other hand, the Board's interpretation in Benedict is followed, then it is necessary to consider the evidence respecting the existence of a demand for medium density uses which has been referred to above. The Board accepts the evidence of Ms. Erskine Doucette which supports the contention that little demand exists.

Policy P-211 was interpreted by the Board in Benedict as requiring Council to consider "the multiplicity of rezoning applications brought in this stable community, and ought to have at least fully considered and acted upon the stated policy of recreational lands before risking an increase to the population in so radical a fashion as is predicated by this rezoning." (4-B M.B.D. 291 at page 323).

One of the arguments raised by the Interested Persons is that the Council and the Board should indicate "that the large number of applications is a factor" that has led to the decision to refuse the rezoning and that to do otherwise sends a message "that a persistent developer can wear down and whittle away the zoning and planning protections which the residents perceived they enjoyed". In the Board's opinion there is no mechanism present which would prevent a developer from reapplying. One anticipates that any subsequent application following a refusal will incorporate features that will make a proposal more acceptable to the residents.

Policy P-501 is an implementation policy which sets out all the criteria which Council must consider before amending the Land Use By-law. In his report Mr. Nelson evaluated the various criteria in P-501 positively but he did note certain matters which could be interpreted differently. The first is with respect to Financial Implications. A letter from Chief Murray, Traffic Authority, is an appendix to the Planner's Report and recommends that "consideration be given to allow for the widening of Young Street" and refers to an increase in traffic. This has an implication for increased costs to the Town.

The second matter refers to contamination, erosion and sedimentation. The report notes this as a concern but suggests that the phasing is of the project will control this. The subject property borders an area with environmental constraints and Policy P-278 places restrictions on the use of such areas. Before approving a large scale development in an area with excessive slopes and drainage concerns, it is useful to receive an assessment from the Department of Environment. That was not done in this case.

The Board wishes to note that the Planner's Report which was prepared for both the 1986 application, which was withdrawn, and the present application contained considerably more detail than the earlier one and reviewed not only relevant policies but the Board's previous decision.

An issue which the Board raised is the weight that is to be given to the evidence of persons who have been qualified as experts in planning matters. The Board was particularly concerned with the experts' interpretation of the various policies in the M.P.S. All the briefs which were submitted are in agreement that the Board is to make its own interpretation of the policies but the opinion of the experts should be taken into account. Mr. McLellan, however, goes on to state that both experts called by the Appellant testified that the proposal was in conformity with the intent of the M.P.S. and that Council's decision to refuse to rezone does not reasonably carry out the intent of the M.P.S. He further stated that given that the Town called no experts to contradict this, the Board should give "strong credence to the expert evidence adduced". The Board has reviewed Mr. Birch's Report and his testimony and that of Mr.

Nelson. The Board is unable to find any statement by either Mr. Birch or Mr. Nelson that Council's decision does not reasonably carry out the intent of the M.P.S. Mr. Birch stated on several occasions that Council was required to approve the application because it met all the requirements. He also stated that Policy P-212 was mandatory given the opening words "Therefore it shall be a policy of Council to:". These words appear in every policy of the M.P.S. and do not in the Board's opinion make Policy P-212 mandatory.

The Board is concerned that both witnesses and counsel stressed that there was no advantage in the Town insisting that an applicant give specific details of the proposed development prior to Council's approval since once the rezoning is in place there is nothing to compel an applicant to develop in accordance with the plans submitted. The Board has in the past stressed that where the M.P.S. refers to "the proposal" Council must consider the various criteria in light of the proposed development and must not place undue emphasis on the worst case scenario. A rezoning application is based to a certain extent on trust. If an applicant radically changes the development once the rezoning is approved then any future applications are likely to be treated very cautiously by Council. The Board notes the decision of the Ontario Court of Appeal in Re Toronto College Street Centre Ltd. and the City of Toronto (1986), 31 D.L.R. (4th) 402 in which it was held that a municipality could rely on promissory estoppel with respect to a commitment made by the developer. In that case a development agreement was involved but it may be that the same principle could be applied on rezonings.

Council is required under Implementation Policy P-501 to consider among other things:

> (c) That controls are placed on the proposed development so as to reduce conflict with any other adjacent or nearby land use...
>
> (e) Provision for buffering, screening and access control to reduce potential incompatibility with adjacent land uses and traffic arteries.

Where an Applicant does not fully disclose his or her intentions it is difficult for Council to give full consideration to the relevant criteria and to be satisfied that it is an appropriate case for rezoning. The Board recognizes that it is not always economically feasible to prepare detailed plans in advance of Council's decision. It is, however, possible to give some details as to the applicant's intentions with respect to the various criteria.

The Appellant raised as a ground of appeal that the refusal to rezone the subject property caused him undue hardship. Section 63(7) of the Planning Act permits the Board to allow an appeal by an applicant, if in the opinion of the Board, the applicant would suffer undue hardship. There was very little evidence led with respect to this issue. The Appellant does not own the subject property and is not bound to purchase the property if the rezoning is not granted. While this is the third time the Appellant has attempted to have this property rezoned, this in itself does not satisfy the criteria of undue hardship. The Board finds that the refusal to rezone does not cause the Appellant undue hardship. The Board further finds that there are no extraordinary or compelling circumstances present which would permit the Board to allow the appeal.

In this case Council was faced with an application to rezone that was very similar to a previous application which Council had approved and the Board then overturned. While the Appellant argued that the basis for the Board's decision in Benedict was the fact that the necessary 2 hectares of land was split into 2 lots, a careful reading of the decision makes it clear that the Board had a number of concerns with the original application and Council's decision. One of the Board's main concerns in Benedict was the fact that Council had delegated to the Planner the duty to consider the criteria in Policy P-501. In this case, Council has considered Policy P-501 and without specifying any particular matter has stated that it is refusing the rezoning at least in part because of Policy P-501. In addition the Board's comments in Benedict on Policy 211 quoted above still apply and may well have influenced Council. The Board's role is not to impose its own view but to determine whether or not Council's decision was reasonably consistent with the intent of the M.P.S. While there are policies in the M.P.S. that encourage residential development, Council is not bound to grant all applications for rezonings for residential use. Council has a discretion which it must exercise reasonably in the context of the M.P.S. The Board is of the opinion that Council's decision is reasonably consistent with the intent of the M.P.S.

The Board dismisses the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 15th day of July, A.D., 1988.

Linda D. Garber

LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

COMEAU v. MUNICIPALITY OF THE DISTRICT OF YARMOUTH

PLANNING - L.U.B. AMENDMENT - REFUSAL TO REZONE G-D TO G-1- SALVAGE YARD - SCRAP YARD - INTERESTED PERSON - AGGRIEVED PERSON - MUNICIPAL BOARD ACT SS. 16(1); PLANNING ACT SS. 51(1)(A); 51(2); 63(1)(a)(b); 63(1A)(a)(i)(ii); 63(3); 63(4); 63(5); 63(7) - SALVAGE YARD LICENSING ACT S. 1(I) - DISTRICT OF YARMOUTH M.P.S. POLICIES A-2; B-19; B-20; F-5; F-6(c);

C. and one R. entered a partnership to open a scrap business on 1.65 acre portion of a 2.5 acre lot in North Chegoggin a mixed agricultural rural area zoned G-D. They proposed to gather scrap, process it to some minor extent, and trans-ship it at periodic intervals by truck to Halifax. C. applied to rezone part of a lot. P.A.C. recommended rezoning. Council decided to refuse rezoning under extreme public pressure. C. appealed to the Board. Neighbour H. joined as an interested party to oppose the rezoning before the Board.

HELD: The Board dismissed the appeal and confirmed the decision of Council.

L.U.B. distinguishes between scrap yard and salvage yard. The Board held that at least part of the proposal would require C to obtain a licence under the Salvage Yard Licensing Act. He had made no attempt to do so. Policy F-5 allows rezoning for "major developments". The Board expressed strong doubt that the present proposal was a major development. The Board concluded that Council turned down the rezoning solely because of the pressure of the neighbours protests. The Board said the Council's duty was to listen to such representations, give them full consideration, and then arrive at a decision which reasonably fell within the intent of the M.P.S. However, the application was gravely inadequate and lacking in detail and therefore difficult to determine whether or not the proposal fell within the intent of the M.P.S. There was evidence before the Board that, had it been shown to Council, would have supported the decision of Council and thus made Council's decision reasonably within the intent of the M.P.S.

NSMB-10-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S., 1983, c. 9, by **HENRY COMEAU** from a decision of the Council of the **MUNICIPALITY OF THE DISTRICT OF YARMOUTH** made March 14, 1988, which refused an application to amend the Schedule "A" Land Use By-law

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: REAL J. BOUDREAU, LL.B., on behalf of the Appellant, **HENRY COMEAU**;

IRVING PINK, Q.C., on behalf of the **MUNICIPALITY OF THE DISTRICT OF YARMOUTH**, a Respondent;

REIGH HAZELTON, Interested Person, on his own behalf.

HEARING DATE: July 12, 1988.

DECISION DATE: July 27, 1988.

DECISION: APPEAL DISMISSED.

DECISION

Pursuant to section 16(1) of Chapter 9, S.N.S. 1981, **The Municipal Board Act**, the Chairman assigned Board Member, Richard L. Weldon to hear this planning appeal at the Board's July 12, 1988, sittings held at Rodd's Grand Hotel, Salon Room, YARMOUTH, Nova Scotia.

There was a Notice of Appeal (Exhibit C-1) dated March 28, 1988, complaining of a decision of the Council of the Municipality of the District of Yarmouth made March 14, 1988, and this Notice of Appeal was received by the Board on March 30,

1988. An Undertaking to pay the costs of advertising the Notice of Hearing was received by the Board on March 30, 1988 and constitutes Exhibit C-3. Exhibit C-2 is an Amended Notice of Appeal dated April 12, 1988 and was received by the Board on April 13, 1988. In the Amended Notice of Appeal made under instructions from the Clerk of the Board it notes that the appeal was "from the decision of the Council of the Municipality of Yarmouth [sic] made March 14, 1988,...which decision was a refusal of the Appellant's application to amend the Council's Land Use By-law Schedule "A" in that the Appellant applied to have a certain lot of land at North Chegoggin in the County and Province aforesaid, rezoned from a General Development (G-D) Zone to a General Industrial (G-I) Zone for the purpose of operating a scrap yard".

On the face of the Amended Notice of Appeal the grounds for appeal are:

> "(1) The Council erred in refusing the application in that the proposed amendment fell within the criteria of Policy B-20 of the Council, which policy sets out the requirements for establishing a General Industrial (G-I) Zone within the Municipality of Yarmouth;
>
> (2) The Council erred in concluding that there was insufficient evidence adduced at the hearing to warrant the granting of the application."

The Applicant, **HENRY COMEAU**, had applied to rezone a certain block of land on the Dayton Road opposite its intersection with the Edson Conrod Road in North Chegoggin. The land is graphically shown on a plan of subdivision forming a part of Exhibit C-15 the Application to Rezone. It has a frontage on the Dayton Road, a public highway in the Municipality of the District of Yarmouth, of 21.502 meters. Its eastern boundary is against a hayfield and it stretches thereon 81.273 meters. On its southern boundary it stretches 91.559 meters. On its fourth boundary it stretches along a road known as a sled road for a distance of 103.331 meters. At that point it arrives at the back of a house located on a small lot marked "lands of Henry Comeau" which fronts on the Dayton Road. On the rear line of that house lot it stretches 36.351 meters and on the east line of the Henry Comeau lot it stretches 48.967 meters back to the place of beginning on the Dayton Road. The plot of land was originally a four-sided irregular shaped area. With the house lot removed it has become a six-sided lot of slightly under three acres. Sketched on the plan is an area directly behind the house lot roughly 200 feet (60 metres) by 250 feet (75 metres) by some lesser dimension and which is proposed for use as the scrap yard facilities. Located in this large portion of the lot are some low areas, some gardens and a couple of small out buildings of probably very little present economic value. The land is owned by the Appellant's son and the application to rezone was made with his permission. On page 2 of the application to rezone it notes proposed uses for the scrap yard - buying and selling copper, brass, metal, cast iron, steel, white metal and aluminum.

The appeal came on for hearing at 10:00 a.m. on July 12, 1988, at Rodd's Grand Hotel, Yarmouth, Salon Room, pursuant to a Notice of Hearing, Exhibit C-7. Service of the Notice of Hearing and Notice of Appeal and all other necessary documents were appropriately proved and, with the consent of the counsel for the Municipality, all necessary procedural requirements for the appeal have been fulfilled. The Board found that it had jurisdiction to hear this appeal on its merits.

The following are some excerpts from the Planning Act Sections bearing on this appeal which bear quoting here:

> "51(1)(A) A council, on its own motion or on the application of any person, may subsequently amend a land-use by-law in accordance with policies contained in the planning strategy.
>
> (2) A council shall not adopt or amend a land-use by-law except to carry out the intent of a municipal planning strategy.
>
> 63(1) The amendment, revision or refusal by a council to amend or revise the land-use by-law pursuant to subsection (1A) of Section 51 may be appealed by
>
> (a) an aggrieved person;
>
> (b) the applicant;
>
> ...
>
> (1A) In subsection (1), "aggrieved person" includes
>
> (a) an individual who bona fide believes that the amendment, revision or refusal by council to amend or revise the land-use by-law will adversely affect
>
> i) the value of or the reasonable enjoyment of that person's property, or
>
> ii) the reasonable enjoyment of the property occupied by that person;
>
> ...
>
> 63(3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy.

> (4) The Board may
>
> (a) confirm the decision of the council;
>
> (b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law; or
>
> (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board.
>
> (5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy.
>
> ...
>
> (7) Notwithstanding subsections (5)...the Board may allow an appeal by an applicant if, in the opinion of the Board,
>
> (a) the applicant would suffer undue hardship; or
>
> (b) extraordinary and compelling circumstances are present.

The Board determined from the facts in this case that the Appellant is certainly an "Applicant" within the meaning of the **Planning Act** sections cited above, and may be, as well, an "aggrieved person". Reigh Hazelton, the neighbour to this property whose residence is located directly across the Dayton Road at its intersection with the Edson Conrod Road, was qualified by the Board as an "Interested Person" pursuant to the **Municipal Board Act** and sat with counsel and took part in the proceedings.

Mr. Boudreau for the Appellant called the Appellant, Allan Rodgerson and Carl Sweeney. The Interested Party, Reigh Hazelton, gave evidence himself and called his Wife, Susan

Hazelton. Mr. Pink on behalf of the Municipality called Gary Saunders, William Scott, Warden Daniel Stanton and Councillor Stanley Goodwin.

Henry Comeau, the Applicant, lives in North Chegoggin and works as a carpenter and general labourer. He said he proposed to locate the scrap yard behind an 8-foot opaque fence directly behind his home which is located on the Dayton Road. He says his proposal is to use an area 200 by 250 feet behind the house and on that he will gather copper, brass, aluminum and he will take car radiators and these will be processed to some extent on site and some of the impurities removed by physical means. The resultant material will be gathered up and taken away to Halifax for resale as demand requires at a minimum of once a month. He and Alvin Rodgerson have entered into partnership. Mr. Rodgerson will provide the transportation and trucking, Mr. Comeau the land. They will be trucking and selling their scrap to Dominion Steel, an operation in Halifax.

Mr. Comeau said that the property is totally surrounded by farming property (except for the house in which he lives) and there are no open bodies of water on the subject property. On cross-examination by Mr. Pink he admitted that the closest house to the subject land other than his own was that occupied by Mr. and Mrs. Hazelton.

The Appellant admitted that he had done some burning of copper wire to remove the insulation cover from the wire in the past. He said that he would maintain a very small stockpile of scrap since he does not have the capital to amass scrap in large quantities. He does not contemplate any more employment than for himself and his partner at the present. Mr. Comeau felt that if the organization prospered properly, he would have to move to another site in order to accommodate any radical business growth.

Mr. Comeau says he will be doing no burning whatsoever of scrap wire and that he feels he won`t be dealing with car batteries but he will be dealing with car radiators. He said that there are no competing scrap yards and he feels there is demand for a good scrap yard in the municipality. He intends no smelting of any metals.

His partner, Alvin Rodgerson, testified next. He is a garbageman who owns his own one-ton truck He would use his truck to take a 3-ton load of scrap to Halifax as soon as the yard would accumulate that quantity of scrap. His truck is covered and has two rear doors completely enclosing the body.

Mr. Rodgerson said no car bodies would be brought onto the subject site.

Mr. Rodgerson feels there is demand for this particular type of scrap yard function. When he formulated the idea for this business he approached Mr. Comeau who had some land available to accommodate the business. Mr. Rodgerson said that they have not canvassed whether they were required to be licensed and supervised under the **Salvage Yard Licensing Act** but he does not think they would be.

Mr. Rodgerson said that the materials received at the site would be stored on the site after they were reduced in size and stored in large plastic containers. The materials would be delivered to Halifax in those containers.

Carl Sweeney testified on behalf of the Applicant/Appellant. He is a farmer who has done farming on the adjacent area to the east. He says that the placing of a scrap yard will not affect his farming operations in the least and he thinks it would be a good thing for the area. Mr. Sweeney lives two or three miles from the particular area.

Reigh Hazelton then testified. He feels that the scrap yard located in the area will bring down the value of his house property that he only bought two years ago. He said he would not have bought his house property had he known that there was going to be a scrap yard opposite it.

Mr. Hazelton said in the past burning had occurred on the site which caused troubles and he has seen people pick up and deliver loads of scrap to the site.

Mr. Hazelton said he made a personal contact with Mr. Comeau concerning the rezoning and he had apprised Mr. Comeau of his own views against the rezoning application. Mr. Hazelton said that he participated in the gathering of a petition of people in the area against the scrap yard. The Petition is before the Board as Exhibit C-11.

Susan Hazelton testified next. She said she was a school teacher and the wife of the last witness. She was concerned that the residential property value of their house would go down with a scrap yard being located opposite them. She says, as a mother of a child who is asthmatic, she found that the burning on the site in the past had affected her child and she said there is no provision to prevent renewal of burning in the future.

Gary Saunders said he is an employee of the District Planning Commission (D.P.C.) and is paid by the Municipality of Argyle, Tusket office. He was called on to make recommendations to the Municipality of the District of Yarmouth concerning this rezoning application.

Mr. Saunders concluded that, after reviewing the relevant policies, the rezoning was in agreement with the Municipal Planning Strategy (M.P.S.) of the Municipality of the District of Yarmouth. He filed a report with the Planning Advisory Committee (P.A.C.)of the Municipality of the District of Yarmouth and as far as he knows that report went forward to the Council.

Mr. Saunders said that there was a proposed industrial park (not yet brought to fruition) of about 150 acres in the Municipality on which a scrap yard could be located by development agreement. This industrial park is not yet in being and certainly was not in being at the time the Applicant applied for his rezoning. Mr. Saunders thought there was 2.59 acres in the whole block to be rezoned and 1.67 acres was to be used for a scrap yard. There was no specific plan of the land to be rezoned.

Mr. Pink for the Municipality called William Scott, Clerk of the Municipality of the District of Yarmouth, who has been Clerk and Chief Administrative Officer of the Municipality for over 19 years. Mr. Scott pointed out that the Municipality has a great deal of trouble having the Public Utilities Board (P.U.B.) properly supervise the several salvage yards that are in the Municipality now and that although the Municipality has never sued the P.U.B. to properly perform its function of supervision under the relevant statute they have tried every other means to try and get the salvage yards in the Municipality brought into line with little success.

Mr. Scott pointed out that the residents of the area don't want the this yard in their area. He said that the area concerned was a very quiet agricultural area. In his opinion the intent of the M.P.S. was to keep the area intact.

Warden Daniel Stanton has been the Warden of the Municipality of the District of Yarmouth for six years and has been 18 years as a municipal councillor. He believes the intention of the M.P.S. is not to have the zone too restrictive. He said the Chegoggin area was "rural, quiet, serene, residential and picturesque". He said he does not like scrap yards and the intent was not to put scrap yards in such an area. He believes the decision of Council followed the intent of the M.P.S. He feels there are other places, more suitable, in the Municipality for scrap yards. He criticized board fences as not being attractive in any event. He said that the Council decision was unanimously against the rezoning.

Councillor Stanley Goodwin of District 6 is the Councillor for the District in question. He said the nearest similar type operation was a body shop about 1 mile away. Councillor Goodwin is also a member of the P.A.C. He also finds a great problem with salvage yards due to the lax enforcement by the Provincial Government of the salvage yard controls.

Councillor Goodwin said the area is predominantly agricultural, fading into residential, as development comes outward from nearby Yarmouth. He said there are ten to fifteen houses that have been built in a ribbon fashion along the Edson Conrad Road. Councillor Goodwin had voted for the application to rezone at the P.A.C. and voted against the rezoning at Council.

Councillor Goodwin disagrees with the engineer who had given the ecological report that there was no environmental damage possible.

At the end of the evidentiary portion of the hearing, verbal argument was made by the two counsel and the interested party and the Board adjourned for a view of the site and for its subsequent delivery of its written decision.

The Board wishes to point out that at no time during the proceedings was Gary Saunders qualified as a person entitled to give expert opinion evidence concerning planning matters for the Municipality of the District of Yarmouth. Mr. Pink who called him did not so qualify him and neither did Mr. Boudreau who cross-examined him. It is noted however that the evidence discloses that Mr. Saunders is employed by the D.P.C. which apparently assists with planning for the Municipality of the District of Yarmouth. According to the evidence, Mr. Saunders does give planning advice to the Council of the Municipality of the District of Yarmouth in the usual course of his employment.

Mr. Boudreau, for the Appellant, argued that the application agrees with the intent of the M.P.S. and that the refusal does not.

Mr. Pink argued that the decision of Council agrees with the intent of the M.P.S. and that it was done for reasons within the intent of the M.P.S. or "reasonably" within the intent of the M.P.S. He advocated that the opinions of the Warden and the Councillors as to the intent of the M.P.S. were of great force and effect. The Interested Party, Mr. Hazelton, agreed with the representations made by Mr. Pink.

The Board is required to look at the entire M.P.S. in an attempt to discharge its function to determine the intent of the M.P.S. and the Board has done so. Attached hereto as Schedule "A" are some of the relevant portions of the M.P.S. and the L.U.B. that the Board thought considerably relevant to this particular application.

According to the Minutes of Council brought before the Board in various matters including Exhibits C-8, the matter was dealt with as follows:

"5. Items for discussion, information and/or approval:

a) A public hearing was held on behalf of an application received by Henry Comeau to rezone lands in North Chegoggin from General Development (G-D) to General Industrial (G-I). The application proposes the establishment of a scrap yard for the purpose of buying and selling scrap materials. The planner presented his report outlining the information and had been forwarded by the Planning Committee and the recommendations of the Committee. Several residents from the area were present and the spokesman for the group, Michael Boudreau, presented a petition against the application which contains 73 names. The residents felt that the impact of such a business in this area would be detrimental to the community. This business would require burning which would cause nuisances to the neighbouring properties. A water course drains the river through the property and it was felt that run-off from such an operation would pollute this river which is used by farmers in the area as well as residents for fishing, etc. An adjoining property owner who is a farmer also expressed concern of potential pollution and possible contamination of his livestock. The watercourse in question was discovered by the planner and the development officer on inspection of this property and this watercourse was not shown on present mapping. It was moved by Councillor Patricia Rodney and seconded by Councillor Stanley Goodwin that application by Henry Comeau to amend Schedule "A" of the Land Use By-law be denied. Motion carried unanimously."

On other documentation which stated reasons for being against it is the Petition, Exhibit C-11, which reads as follows:

"We the residents of North Chegoggin and surrounding area, hereby make Petition against the rezoning of lands belonging to Alan Comeau, from G-D Zone to G-I Zone. The purpose of said land will be used by Henery [sic] Comeau for the purpose of a scrap metal salvage yard. We feel that the impact of such a business in this area would be detrimental to the community. The business would require the burning of wire to remove the insulation from the copper strands. Thus releasing smoke, gases, and fumes in the air that would cause an annoyance to the neighbours. Also there is the matter of a natural watercourse which runs through the property down to a very much used river. We feel that run-off water from such an operation as this would

> pollute the river to a point where fishing, and the natural migration of fish would be detrimental to the environment..."

This Petition was dated the 9th of March, 1988, and was put before Council although not before the P.A.C.

The Board took a view of the site accompanied by Gary Saunders and was met at the site by the Appellant, Henry Comeau.

The Board is satisfied on the evidence it has heard that in the past, Henry Comeau has used this property for scrap collection, although he has not done so for some considerable period of time, upwards of three months. The Board is satisfied on the evidence that Henry Comeau in the past has done some burning of copper wire so that the insulation can be burned off leaving the copper residue for resale. The Board is satisfied that when that wire was burned there was an effect on the son of Mr. and Mrs. Hazelton, the neighbours across the Dayton Road.

As argued by Mr. Boudreau the Board is satisfied that the general nature of the area is agricultural and not residential. The two nearest residences are the residence of Mr. Comeau, the Applicant, which is immediately adjacent to both the rezoned area and the lesser area of the proposed scrap yard and, the next nearest residence is that of Mr. and Mrs. Hazelton whose home is located immediately across the Dayton Road from the subject land. There is another neighbour within 200 or 300 yards of the property. The rest of the land surrounding the subject property is open fields apparently either in undeveloped condition or light agricultural use such as hayfields.

The subject site itself has a degree of scrubbish wood cover of greater or lesser heights and is on a lower elevation than either the house of Mr. Comeau or the house of Mr. and Mrs. Hazelton.

Exhibit C-12 is a report dated June 7, 1988, from U.M.A. Engineering Limited addressed to Mr. Irving Pink and signed by Mr. J.M. Murphy, P.Eng. Chief Environment Engineer, Atlantic Region. The head of this report says that the people are planners, engineers and project managers. The text is as follows:

> "An application was received by the Municipality of Yarmouth [sic] from Henry Comeau to rezone lands in North Chegoggin from General Development (GD) to General Industrial (GI) for the purpose of establishing a scrap yard. The application was apparently submitted in late 1987.
>
> The application was reviewed by staff and a report presented to the planning advisory committee on January 13, 1988. The report concluded that the proposal did not violate the policies as set out in the Municipal Planning Strategy and that the rezoning request was justifiable.
>
> A public hearing was subsequently held to review the rezoning application at which time the planning report was presented. Several residents from the area were present and submitted a petition against the application which contained 73 names. The residents generally felt the proposed scrap yard would be detrimental to the community. One of the chief concerns related to a water course which drained through the property. It was suggested this water course could pollute the Chegoggin River and possibly contaminate livestock on adjacent farmland. Council therefore denied the rezoning application based on these objections.
>
> Council's decision to refuse the rezoning application has been appealed to the Nova Scotia Municipal Board. The appeal is based on grounds that the proposed rezoning did, in fact, comply with the policies of the

Municipal Planning Strategy and that sufficient information was provided at the hearing to support the application.

In accordance with our discussions of May 16, 1988, I have carried out some preliminary investigations to determine if negative environmental impacts would provide a reasonable defence of Council's decision to reject the application. The property in question was inspected with the Municipality's Planner and Development Officer and in the presence of the owner. A big hole or depression exists on the south east corner of the property and collects runoff from a relatively small surrounding drainage area. This bog area was reportedly used at one time for extraction of peat. Natural drainage or runoff from the bog area flows in a westerly direction towards the Chegoggin River. On the day of our visit, a small amount of surface water was observed to be flowing across a trail, which parallels the western property boundary, towards the River. The owner advised that this runoff is seasonal in nature and dries up completely during the summer. Given the nature and extent of the drainage area, I would expect this to be true.

I discussed the proposed development with officials of the Provincial Environment Department. They advise that scrap yards in the Province generally do not pose serious environmental problems. However proper procedures must be used in the handling and control of materials such as battery acids and waste oils. The department requires that a scrap yard not be developed within 100 feet of a river or identifiable watercourse. The proposed site is approximately 800 to 900 feet from the Chegoggin River. The natural drainage from the site will, however, flow towards the River during periods of protracted or intense rainfall.

I also discussed the proposal with staff of the Public Utilities Board who are responsible for licensing of salvage yards in the Province. They advise that licensing applications are normally received directly by the Board. The Board then ensures that the proposed land use does not contravene the provisions of any Provincial Acts including the Municipal Act, the Water Act and the Environmental Protection Act. Public hearings are normally held to deal with these issues. A conditional license may be issued to control activities of concern such as battery acid and waste oil recovery and burning. The activities are monitored by the Board's inspectors and the licence may be revoked if the operator does not comply with the

> terms of the licence.
>
> In my opinion, it may be difficult to defend Council's decision on the rezoning application based on environmental grounds alone. The key issue may hinge upon whether the runoff from the site is characterized generally as runoff or whether it is carried by an identifiable watercourse which is within 100 feet of the proposed operation. From my observations and my understanding of the Environment Department's position on this issue, I would not expect the operation to be considered a serious environmental risk.
>
> Should the rezoning proceed, either by Council approval at this time or through the appeal process, the proponent will then be required to apply for a licence from the Public Utilities Board. The issue of environmental risk will be investigated further by the Regulatory Agencies at that time and the licence will only be granted subject to their approval and with whatever qualifications are considered appropriate.
>
> I trust the above is sufficient for your immediate deliberations on this subject. Please advise of your future requirements and of the appeal status."

All parties agreed to the admission of that report. The Board therefore admitted the report.

Exhibit C-20 is entitled "Municipality of Yarmouth Review Henry Comeau Request to Amend Schedule "A" land Use By-law" and it was presented first to the Municipality of Yarmouth Planning Advisory Committee, January 13, 1988. It apparently starts at page 2 of a document and follows apparently some sort of format. Certain excerpts will be quoted here:

> "...D. M.P.S. Generalized Future Land Use Map 7 designation: GENERAL DEVELOPMENT
>
> E. Land Use By-law Schedule "A" Zone designation: GENERAL DEVELOPMENT (G-D) ZONE.
>
> 4. M.P.S. REVIEW: THE REQUEST AND PROPOSAL
>
> ...Policy A-2 states that future development within this designation will be guided by the provision of the

By-law and that the By-law will apply, among other zone categories, a General Industrial (G-1) Zone for industrial uses.

Policy B-19 establishes the (G-I) Zone in the By-law while Policy B-20 states that such uses will be considered within the General Development designation only by amendment to the By-law subject to the following criteria:

a) that the proposed use abuts a public road listed and maintained by the Department of Transportation;

b) that the proposed use is not located in an area where existing development is predominately residential;

(c) that potential nuisance effects of noise or odour, dust or any other airborne emission or waste water resulting from the operational activities of the proposed use do not negatively effect abutting residential, institutional and recreational uses;

(d) that traffic noise and headlight glare does not negatively effect abutting residential, institutional and recreational uses;

(e) that the proposed use conforms with all relevant criteria of Policy F-6 in the Implementation Chapter.

Policy F-6 in the Implementation Chapter states:

[See Schedule "A" for the quote].

A review of the proposal in accordance with Policy B-20 reveals:

a) that the proposed use abuts a public road listed and maintained by the Department of Transportation;

b) that given the generally large lot ownership pattern and the subsequent scattered nature of existing residential development within the area, the proposed use cannot be said to be within an area where development is predominately residential;

c) that the proposed use is not of a type that generates noise, odour, dust or any other airborne emission or waste water resulting from its operational activities that would negatively effect residential uses to the north and west;

(d) that the proposed development is situated on a well travelled road. the access drive to the site is on a northeastwardly - southwestwardly axis, therefore, traffic noise and headlight glare should not have a negative effect upon the dwelling on the north side of the Dayton Road opposite this point of access.

a review of the criteria of Policy F-6 reveals that the proposal satisfies:

i) Subsection (a) in that the proposal satisfies the criteria of Policy B-20;

ii) Subsection (b)(i) in that there is no municipal cost regarding the development;

iii) Subsection (b)(iii) in that the development has direct access to a public road listed and maintained by the Department of Transportation;

iv) Subsection (b)(iii) in that the water hole on the subject property is a depressional area receiving seasonal run off from the surrounding higher ground. Available mapping does not identify any watercourse leading to or from this area on the subject property;

v) Subsection (b)(vi) in that there is no natural resource base to be impacted upon by the proposal;

vi) Subsection (c) in that there are no buildings or structures to be erected on the site which is relatively flat. there are no watercourses, highway ramps, railway rights-of-way or other nuisance factors.

5. CONCLUSION AND RECOMMENDATION

This report concludes that the proposal does not violate the policies as set out in the Strategy. Therefore, the request to rezone the subject property from General Development (G-D) to General Industrial (G-I) to accommodate a scrap yard operation is justifiable."

This report is unsigned and has a consent from Mr. Alan Comeau the landowner for the rezoning and a couple of "plans" attached.

In the report from U.M.A. (Exhibit C-12) there is a reference made to the **Salvage Yard Licensing Act**, R.S.N.S. 1967, C. 276 as amended. That report proceeds on the premise that this scrap yard will be required to be licenced under this Statute by the Public Utilities Board. The Board during the course of the hearing adopted (without any apparent basis therefor) the same line of thought in its questioning of the various witnesses. The Land Use By-law of the Municipality of the District of Yarmouth seems to contemplate salvage yards and scrap yards and distinguish between them. The definition of the **Salvage Yard Licensing Act** Section 1(i):

> **"Salvage Yard means premises where used bodies or parts of automobiles or used bodies or parts of other vehicles or machinery or used goods, material or equipment of any kind are placed, stored or kept".**

It is quite clear that in the past parts of automobiles, namely batteries and radiators, have been on the subject property. The use, as proposed by the partners in this particular application means automobile radiators, at least, will definitely be brought onto the subject property. In that case of use it is the view of the Board that U.M.A. is correct in saying that a licence under the **Salvage Yard Licensing Act** is required for the proposed uses in addition to the Municipality's requirements for use as a scrap yard.

The Board has dealt with salvage yard applications on at least two previous occasions, both in Cape Breton County. One was allowed in Lee's Auto Salvage v. Cape Breton County, 1986 5-B M.B.D. 208 and one was refused, Power v. Cape Breton County, 1986 5-B M.B.D. 477.

On review, these cases do not bear directly on the case at hand because they both dealt with rezoning applications in an area where there was no M.P.S. in effect and therefore different sections of the **Planning Act** applied than apply to this present appeal. It is noteworthy that in both those cases the Applicants had applied for and received **Salvage Yard Licensing Act** licences conditional on their receiving the necessary zoning approval from the Municipality involved. The Board has carefully reviewed these two decisions just cited and does not find that they have any particular determinant guidance to give to the resolution of the present appeal. The Board notes, however, they give some help in the proper disposal of, and as to the proper tests to be applied by Council and by the Board to any scrap yard rezoning.

There is a difference under General Industrial (G-I) Zone between "Salvage Yards" (found on page 54 of the L.U.B.) and "Scrap Yards". If there is a real distinction between these (and the Board is not sure that there is having read the **Salvage Yard Licensing Act**), it is clear to the Board that at least part of the use of the land as proposed by the Applicant/Appellant will be for a salvage yard and a Salvage Yard Licence should be forthcoming before he could operate. This is in respect to automobile batteries and the radiators of automobiles at the very least. In this case therefore the Applicant has not applied for a Salvage Yard License as had the Appellant in Lee's Auto Salvage, one of the Cape Breton cases cited. In that case there was in existence a conditional licence under the **Salvage Yard Licensing Act** subject to the granting of the appropriate municipal zoning. It is the Board's belief in listening to the Applicant that he had no knowledge or intention of obtaining a **Salvage Yard Licensing Act** licence at the time he applied to Council or indeed at the time that he testified before the Board. He did state that he would conform with all the legalities but he did not have any knowledge or apprehension about the provisions of the **Salvage Yard Licensing Act** as they might apply to his proposed operation.

In the L.U.B. there are two definitions cited and the definition of "salvage yard" specifically excludes "scrap yard". In definition 65, "scrap yard" is defined. The Board suggests if there is any conflict in these two definitions then the definition found for "salvage yard" in the **Salvage Yard Licensing Act**, then the **Salvage Yard Licensing Act** may prevail to the extent there is a conflict. The Board further feels that the meaning of the Land Use By-law definitions shows that the "scrap yard" is apparently a less obnoxious use than a "salvage yard" but there would be no full automobile bodies or items of the like nature in a scrap yard. It is not necessary for the disposition of this appeal to definitively reconcile these apparent conflicts. The definitions in the L.U.B. are very clear and explicit but nothing perhaps in this decision hangs on the fact that a portion of the Applicant's proposal does clearly fall within the "salvage yard" definition contained in the **Salvage**

Yard Licensing Act.

In the M.P.S. at page 76, in policy F-5 it uses the phrase "but major development proposals shall be processed as zoning amendments or by the use of development agreements." (emphasis by THE BOARD) there is no provision in that implementation policy to deal with minor development proposals in any way at all. This raises the prime question of whether or not the proposal concerned is a "major" development proposal. Subjectively it is a "major" development proposal to the Applicant or the Board assumes he would not have gone to the trouble and expense that he has gone to in applying for rezoring and then applying for an appeal. The land area itself may or may not be substantial as it is almost three acres in extent and provides for almost an acre and a half to two acres in use. From the employment and economic point of view, there appears to be little evidence of heavy or "major" impact economically either on the community in which it is involved or on the Municipality as a whole. There appears to be, at most, some supplemental employment of the Applicant and of his partner. There appears to be no other general economic impact on the area. The Policy itself only impliedly excludes a "minor" development proposal, it does not expressly exclude one. Yet by inference the Board could conclude that the intent of the Policy F-5 is to deal only with "major" development proposals.

This argument between "major" and "minor" development proposals was raised in an appeal before the Board in the case of

Century 21 Market Realty Ltd. v. Town of Truro, 1985 4-B, M.B.D. 66 at page 88: "It is the intention of this plan to deal with those developments of a large scale by development agreement". In the Century 21 case counsel argued that the Town could not deal with this particular renovation of one building by development agreement as was proposed by the Appellant because it was not on "a large scale". The Board in that case did not specifically deal with the matter of this particular argument but impliedly rejected it because it found it contrary to this particular submission among others. This was a three-member Board consisting of then Chairman, R.H. Blois, Q.C., Vice-Chairman, Elizabeth Lawrence and Member, Darryl W. Wilson. This Century 21 case was referred to a latter case also dealing with the Town of Truro, Maritime Residents Estates Ltd. v. Town of Truro, NSMB-584-87-P (unreported). At pages 14 and 15 of the filed decision the Board had this to say concerning the Century 21 decision:

> "Century 21 is an appeal decided by three Board Members decided in relation to the M.P.S. in Truro, and decided in relation to a development agreement in the Area I Revitalization Area. The affect of the development agreement of Century 21 was to alter the interior of a Victorian style building and to turn it into a real estate office with the top portion to be residential and the backyard into a parking lot."
>
> The Board mentioned that the counsel in the Century 21 case argued that this was not a large property. At page 89 of the reported decision:
>
> "Finally Mr. Curtis submitted that pursuant to policy P-503 counsel would only deal with large scale developments".
>
> In a subsequent part of the decision the Board did not

> deal specifically with this quotation "large scale" allegation but it did implicitly decide against "large scale argument" in the result of its findings. It is clear that the $850,000.00 proposed cost for the demolition and rebuilding in this case is a "larger scale" development than the development envisaged in the Century 21 decision."

There appears to be no other Board cases dealing with "large scale", or in this particular case, "major" development."

The Board at this stage of its decision will not rely on "major" development as a determinant for this appeal but it has very strong doubts that this is a "major" development within the meaning of Policy F-5 of the M.P.S. of the District of the Municipality of Yarmouth.

The records that were adduced at the hearing concerning this appeal indicate to the Board that the Council responded directly to the protests of the neighbours. In such circumstances, Council must listen to the public representations and give the representations full consideration. After due consideration, Council must arrive at a decision which reasonably falls within the intent of the M.P.S.

The only stated reasons that the Board sees from reading the Minutes are those that have been cited previously on the Petition.

There is an engineering report accepted by both sides which tends to discount the environmental reasons stated in the Petition as to water flow. The Board has read again the U.M.A. report and wonders how it (U.M.A.) can make a finding or formulate an opinion that there will be no fumes and other types of problems to emanate from this particular scrap yard as proposed by the Applicant/Appellant.

Mr. Pink in his argument argued that the Board can only interfere with the decision of Council if the decision does not reasonably (and he emphasized the word "reasonably") conform with the intent of the M.P.S. The proposer of this particular application has not in the view of the Board and on the evidence submitted to the Board conformed with some of the criteria of the Implementation Sections of the Municipal By-law in that there has not been sufficient evidence brought before Council or the Board as to the suitability of the proposed site in terms of steepness or grades, soil or geological conditions which is part of policy F-6(c). This evidence was not brought to this Board and it was not, according to the records presented to the Board, put before Council by either the developer or the person, unsigned, who filed the report with the P.A.C. and Council.

Thus in this particular case, the Board is confronting the action of a Council who reacted to public pressure when public pressure was applied for no apparent reason under the M.P.S. The Board finds, on the other hand, an application that is very incomplete in detail, very difficult to follow and very difficult to find whether or not it was within the intent of the M.P.S.

It is the view of the Board for the Applicant to succeed in this matter, he has the burden of showing to a reasonable probability that the decision of Council was not reasonably within the intent of the M.P.S. and that his proposal would be within the intent of the M.P.S. before he can succeed to the extent that he gets one of the remedies, allowed by the **Planning Act** to the Board, which is to allow the appeal and to order a rezoning. If the Board cannot allow the appeal and order the rezoning perhaps the only option left to the Board under the statute is to dismiss the appeal. The Board may be unable to dismiss the appeal if it finds that the decision of Council was not reasonably within the intent of the M.P.S.

In this particular case there appears to be facts that satisfy the Board that, had they been adduced to Council, would have satisfied the Council's duty to see that their decision was within the intent of the M.P.S. To that extent the Board will put a meaning on the word "reasonably" and say, in effect, that although the proper evidence was not adduced before Council so that it could properly make up its mind, it so happened the information adduced before the Board showed that if that information had been adduced before the Council the decision of the Council would have been "reasonably" within the intent of the M.P.S.

As the Board has already noted neither counsel attempted to qualify Mr. Saunders as an expert witness before this Board entitled to give opinion evidence concerning planning matters as they affect the Municipality. Even if he had been so qualified as an expert witness and his report therefore been taken at its full face value, it is clear that all he said was that the "possibility" of the land being rezoned existed. The Board cannot find in the report any text saying that the rezoning fell within the intent of the M.P.S., but that it "could". The report made no contrary opinion that a refusal would be contrary to the intention of the M.P.S.

The Appellant has failed in his burden to prove that the decision of Council was not reasonably within the intent of the M.P.S. and therefore the appeal will be dismissed and the decision of Council confirmed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 27th day of July, A.D., 1988.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD

SCHEDULE "A"

EXCERPTS FROM THE MUNICIPAL PLANNING STRATEGY OF THE DISTRICT OF YARMOUTH AND EXTRACTS FROM THE LAND USE BY-LAW BEING EXHIBITS C-13 AND C-14

MUNICIPAL PLANNING STRATEGY - EXHIBIT C-13

Approved by the Minister of Municipal Affairs - November 9, 1984.

INTRODUCTION

...The Strategy...is intended to include all lands within the boundaries of the Municipality of Yarmouth as shown on Map 7.

...

The general intent of the strategy is to ensure that future development in the Municipality, in whatever form it may take, is compatible with surrounding land uses.

...

[P3] Today, the dominant resource of the area is the inshore and off-shore fishery. Only a small agricultural base remains...

[P6] Goals and Objectives

...

The overall goal of the Strategy is to ensure that the future development of the Municipality is directed in such a manner to best develop the natural and man-made environments for the residents.

...

all goals and objectives should be considered collectively....

[P7]...To protect residential development from the encroachment of incompatible land use.

...

To seek the protection of surface and groundwater supply sources by discouraging land development that would negatively affect the quality or quantity of water.

[P8]
II Economic Development

GOAL To encourage the economic growth of the industrial, commercial and tourism sectors in order to maximize employment opportunities and related benefits for the residents within the context of a regional approach.

OBJECTIVES To encourage the development and expansion of small scale commercial enterprises so as to best serve the residents of the Municipality.

...

III Transportation

GOAL To encourage on a local and regional level, the provision of a safe, rapid and efficient transportation...

...

[P10]
A. ENVIRONMENTAL DEVELOPMENT

Residential

...

Generally, the areas immediately adjacent to the Town of Yarmouth ...realized a significant portion of this development. Other areas on their periphery such as...Chegoggin...demonstrated slightly smaller gains...

[P11]

...

A-1 It shall be the intention of Council to designate a General Development category on the Generalized Future Land Use Map (Map 7) to accommodate a wide range of land use activities.

A-2 Within the General Development designation shown on Map 7, future development will be guided through the provisions of the Land Use By-law. The By-law will apply three (3) zones to the General Development designation...General Development (G-D) Zone which will permit a wide range of rural land uses (Refer to Policy A-3), a General Commercial (G-C) Zone for new commercial uses (Refer to Policy B-44) and a General Industrial (G-I) Zone for new industrial uses. (Refer to Policy B-19)

A-3 It shall be the intention of Council to establish in the Land Use By-law a General Development (G-D) Zone to permit the following uses:

...

[P-12]

...

n) existing industrial uses except fish reduction plants; (Refer to Policy B-17)...

...

[P32]

B. ECONOMIC DEVELOPMENT

...this Strategy will develop land use control guidelines which will influence industry and,...outline general policy intentions of Council towards economic growth.

...

[P40]

In future, a range of new resource and non-resource industries could be accommodated in the General Development designation. Such uses should be regulated to minimize the potential for conflict with residential development...Council should establish a general industrial zone and permit industrial uses except...only by amendment to the Land Use By-law and subject to special requirements and restrictions where they abut residential, institutional and recreational uses.

B-19 It shall be the intention of Council to establish a General Industrial (G-I) Zone in the Land Use By-law to...wide range of new resource and non-resource industries...in the General Development designation.

B-20 It shall be the intention of Council to permit new resource and non-resource industries within the General Development designation only by amendment to the Land Use By-law from the General Development (G-D) Zone to the General Industrial (G-I) Zone subject to the following criteria:

a) that the proposed use abuts a public road listed and maintained by the Department of Transportation;

b) that the proposed use is not located in an area where existing development is predominately residential;

c) that potential nuisance effects of noise or odour, dust or any other airborne emission or waste water resulting from the operational activities of the proposed use do not negatively effect abutting residential, institutional and recreational uses;

d) that traffic noise and headlight glare does not negatively effect abutting residential, institutional and recreational uses;

[P41]

e) that the proposed use conforms with all relevant criteria of Policy F-6 in the Implementation.

B-21 It shall be the intention of Council to establish a special requirement in the Land Use By-law that new industrial uses in the General Industrial (G-I) Zone be screened from abutting residential, institutional or recreational uses in the General Development (G-D) Zone by natural landforms, existing or planted vegetation; an opague [sic] fence or other method of landscaping or combination of such method of screening to minimize visual incompatibility.

B-22 It shall be the intention of Council to establish special abutting yard restrictions in the Land Use By-law for parking, loading, open storage and outdoor display where yards in the General Industrial (G-I) Zone abut exiting residential, institutional or recreational uses in the General Development (G-D) Zone and special restrictions for open storage or outdoor display in front yards.

...

[P48]

Statistical data reveals that the number of farms in the region is on the decline....

[P49]

...every effort to improve and increase the agricultural capability in the Municipality should be encouraged wherever possible.

...

[P50]
Map 3 - Chegoggin
CAPABILITY FOR AGRICULTURE

LIMITATIONS:

[3] Moderately Severe
[The Board interprets the "Moderately Severe" limitations on agriculture exhibited on this map to be the best agricultural conditions available in the Municipality of the District of Yarmouth].

...

[P54]

...

B-41 ...it shall be the intention of Council to encourage the...establishment of a new industrial park...

...

[P75]

F. IMPLEMENTATION

...

F-3 In order that decisions may be based on expert advice beyond that which the Municipality is able to supply, it shall be the intention of Council to circulate applications for amendments to the Land Use By-law...to the appropriate provincial government agencies such as Department of Health, Transportation, Environment and Municipal Affairs for their information, comment or approval as may be required.

F-4 The principal mechanism by which land use policies are implemented is the Land Use By-law. The Land Use By-law sets out zones, permitted uses and development standards and...shall reflect the policies of the Municipal Planning Strategy...

[P76]

F-5 It is not intended that all land in the Municipality shall be zoned at the outset as indicated by the policies of this Strategy or as indicated on the Generalized Future Land Use Map (Map 7). Rather, in order that Council may encourage economic development in the Municipality, yet maintain some control over such development, initial zoning provisions will reflect the existing development pattern but major development proposals shall be processed as zoning amendments or by the use of development agreements.

...within the designations as set out in the Generalized Future Land Use Map, various zones will be established and no zoning amendments shall be permitted except in conformance with all policy intents of this Strategy.

Criteria For Amendment To The Land Use By-law.

F-6 In considerating [sic] amendments to the Land Use By-law, in addition to all the other criteria set out in the various policies of this Strategy, Council shall have regard to the following criteria:

a) that the proposal is in conformance with the intents of this Strategy and with the requirements of all the other municipal by-laws and regulations;

b) that the proposal is not premature or inappropriate by reason of:

i) the financial capability of the Municipality to absorb any costs relating to the development;

ii) the adequacy of road networks...adjacent to, or leading to the development;

[P77]

(iii)the potential for the contamination of watercourses or the creation or erosion or sedimentation;

(iv) creating a negative impact upon the natural resource base.

c) suitability of the proposed site in terms of steepness of grades, soil and geological conditions, location of watercourses and the proximity of highway ramps, railway rights-of-way and other nuisance factors;

[P78]

Unsightly Premises By-law

F-10 It shall be the intention of Council to regulate the appearance and maintenance of properties in the Municipality through the Dangerous and Unsightly Premises By-law....

LAND USE BY-LAW - EXHIBIT C-14

Approved by the Minister of Municipal Affairs - November 9, 1984.

[P1]

...

PART II

DEFINITIONS

[P4]

...

19. Development means any erection, construction, addition, alteration, replacement or relocation of or to any building or structure and any change or alteration in the use made of lands, buildings or structures.

...

[P11]

...

36. Loading Space means a vacant area of land provided and maintained upon the same lot or lots upon which the principal use is located...

[P15]

...

48. **Obnoxious Use** shall mean a use which from its nature or operation creates a nuisance or is offensive by the creation of noise or vibration, or by reason of the emission of gas, fumes, dust, oil or objectionable odour, or by reason of the unsightly storage of goods, wares, merchandise, salvage, refuse matter, waste or other material.

...

[P18]

...

64. Salvage Yard means any premises where used bodies or parts of automobiles, or used bodies or parts of other vehicles or machinery are placed or stored or kept; and a salvage yard under this By-law is not limited to a salvage yard as defined by the Salvage Yard Licensing Act of Nova Scotia and it does not include a scarp [sic] yard.

65. Scrap Yard means a lot or premises for the storage or handling of scrap material, and without limiting the generality of the foregoing, shall include waste paper, rags, bones, bottles, used bicycles, tires, metal or other scrap material but does not include a salvage yard.

...

[P24]

...

81. Zone means a designated area of land shown on the Schedules of this By-law.

[P25]

PART III

ZONES AND ZONING MAPS

1. For the purpose of this By-law, the Municipality of the District of Yarmouth is divided into the following zones, the boundaries of which are shown on the attached schedules. Such zones may be referred to by the appropriate symbols.

ZONES	SYMBOLS
General Development	G-D
...	
General Industrial	G-I
...	

...

[P26]

ZONES NOT ON MAPS

3. The Zoning maps of this By-law may be amended, in conformance with the Municipal Planning Strategy, to utilize any zone in this By-law, regardless of whether or not such zone had previously appeared on any zoning map.

[P27]

...

INTERPRETATION OF ZONING BOUNDARIES

3. Boundaries between zones shall be determined as follows:

a) where a zone boundary is indicated as following a street or highway, the boundary shall be the centre line of such street or highway;

b) where a zone boundary is indicated as approximately following lot lines, the boundary shall follow such lot lines;

...

[P28]

...

g) where none of these above provisions apply, and where appropriate, the zone boundary shall be scaled from the attached Schedules...

...

PROHIBITED USES

5. In this By-law, any use not listed under permitted uses in a

particular zone is prohibited.

[P29]

...

LICENSES, PERMITS AND COMPLIANCE WITH OTHER BY-LAWS

...Where the provisions of the By-law conflict with those of any other municipal or provincial requirements, the higher or more stringent requirements shall prevail...

...

[P44]

PART VIII

GENERAL DEVELOPMENT (G-D) ZONE

G-D PERMITTED USES

1. The following uses shall be permitted uses in a General Development (G-D) Zone:

...

Natural resource extractive industries;...

...

[P54]

PART X

GENERAL INDUSTRIAL (G-I) ZONE

G-I ZONE PERMITTED USES

1. The following uses shall be permitted in any General Industrial (G-I) Zone

...

Salvage yards;

...

Scrap yards;

...

G-I ZONE REQUIREMENTS

In a general Industrial (G-I) Zone, no development permit shall be issued except in conformity with the following requirements:

Minimum Lot Area	20,000 square feet
Minimum Lot Frontage	100 feet
Minimum Front Yard	40 feet
Minimum Rear Yard	40 feet
Minimum Side Yard	30 feet
Minimum [sic] Height of Main Building	45 feet

...

[P55]

SPECIAL REQUIREMENT: SCREENING OF GENERAL INDUSTRIAL (G-I) ZONE USES FROM ABUTTING GENERAL DEVELOPMENT (G-D) ZONE RESIDENTIAL, INSTITUTIONAL AND RECREATIONAL USES

3. Industrial uses including any buildings, structures or areas for loading and unloading or open storage in the General Industrial (G-I) zone shall be screened by natural landforms, existing or planted vegetation; an opague [sic] fence or a combination of such method of screening so as not to be visible from abutting residential, institutional or recreational uses in the General Development (G-D) Zone.

ROBSON v. TOWN OF PICTOU

PLANNING - L.U.B. AMENDMENT - DEVELOPMENT AGREEMENT - REFUSAL TO REZONE R-1 TO C-3 - GEN. FLUM - MUNICIPAL BOARD ACT SS. 16(1); 27(3); 27(4); 24(4); 29; - PLANNING ACT SS. 51(1A); 51(2); 60(5); 63(1)(a); 63(3); 63(4); 63(4)(c); 63(5); 63(7); 63(6) - NOVA SCOTIA EVIDENCE ACT SS. 12 -HERITAGE PROPERTY ACT S.N.S. 1980 CHAPTER 8 - PICTOU M.P.S. B-6; POLICIES 26; O-13; B-6A; B-7; B-9; O-8; O-8(a); O-15; O-6; O-7;

R applied to rezone a 2-acre lot on West River Road from R-1 to C-2 in order to build a restaurant. The lot already contained an old brick house but not designated a heritage building. R alleged the lot was in a highway commercial designation on GEN. FLUM and thus eligible to be rezoned. Opponents said it was not, or if it was, could only be developed under development agreement. The Applicant would not be able to do what he proposed under a development agreement. P.A.C. and Council shown the wrong GEN. FLUM. The Development Officer gave no report. P.A.C. recommended rezoning.

HELD: The Board allowed the appeal in part but did not order Council to rezone.

It was conceded that Gen. FLUM in this particular appeal was the most important map in the M.P.S. but wrong Gen.FLUM had been relied on. The Board held that Council's refusal decision was not within the intent of the M.P.S. Conversely it held that the applicant had not sufficient evidence before Council or the Board on which the Board could judge whether or not the proposal was within the intent of the M.P.S. The Board could not order a rezoning that did not comply with the intent of the M.P.S. The burden was on the Appellant to show that his proposal was within the intent of the M.P.S.

Council's decision reflected undue response to exaggerated public pressure. After hearing public representations, Council must interpret the issues before it in the context of the M.P.S.

An L.U.B. amendment must fit within its M.P.S. which must in turn conform with the Planning Act. If an L.U.B. amendment violates the Planning Act that L.U.B. amendment cannot fit within the intent of the M.P.S. A confirmation of Council's decision would be to allow the Council to disregard its own M.P.S. Before the Board would make such allowances the legislation would have to be set out more clearly.

NSMB-596-87-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF AN APPEAL UNDER: **The PLANNING ACT**, being Chapter 9 of the Statutes of Nova Scotia,1983, by **ERIC ROBSON, IAN ROBSON, ROBERT WATT and MARY WATT**,Appellants, from a decision of the **COUNCIL OF THE TOWN OF PICTOU**, Respondent, made on September 10th, 1987, which decision refused to amend the Town's Land Use By-law for Pictou by rezoning Lands off West River Road, Pictou, N.S., from R-1 (Residential) Zone to C-3 (Highway Commercial) Zone

BEFORE: RICHARD L. WELDON, Member

COUNSEL: JOHN F LANGLEY Q.C. for the Appellants,ERIC ROBSON, IAN ROBSON, ROBERT WATT and MARY WATT

E.ANNE MACDONALD LL.B. on behalf of THE TOWN OF PICTOU, a Respondent;

JAMES WILSON, on behalf of some Interested Persons including ROBERT NAYLOR, DAVID CLARKE, BYRON CLARKE, ODETTE HENDERSON

HEARING DATES: February 11, 12, 1988

LAST BRIEF FILED: February 22, 1988

DECISION SIGNED: July 28 , 1988

DECISION RESULT: Appeal Allowed, in part.

DECISION

Pursuant to Section 16(1) of **CHAPTER 9, S.N.S. 1981, THE MUNICIPAL BOARD ACT**, the Chairman assigned Board member Richard L. Weldon to hear this planning appeal at the Board's February 11, 1988 sittings commencing at the Council

Chambers of the Town of Pictou ("Town") Water Street, Pictou, N.S. commencing at 10:A.M.

A registered letter purporting to be a Notice of Appeal (Exhibit R-1), dated September 25, 1987, was filed with the Board on September 29, 1987. By a separate letter dated December 9, 1987 and received by the Board on December 16, 1987, Mr Langley, on behalf of the Appellants, filed an Amended Notice of Appeal (Exhibit R-2) and agreed to pay the cost of advertisement of the Notice of Hearing by a letter dated October 8, 1987, and received by the Board on October 16, 1987 (Exhibit R-3).

The letter purporting to be the Notice of Appeal alludes to a decision of "the Pictou Town Council ["Council"] September 10, 1987, refusing an application by Mr. Eric Robson to re-zone lands off West River Road, Pictou...from R-1 Residential to C-3 Highway Commercial in accordance with the Town's Municipal Planning Strategy.".

The "Amended Notice of Appeal" (Exhibit R-2) states its grounds of appeal, in part, as follows:

> "...in order to permit the establishment of a restaurant on that site under Secton 63 of the Planning Act.
>
> The grounds of this appeal are:
>
> (a) The refusal to rezone the subject site from R-1 to C-3 ... is both inconsistent and at variance with the Municipal Planning Strategy [MPS] for the Town ... specifically Policies B-1 to B-19 as amended;
>
> (b) The refusal ... is contrary to both the letter and intent of the Land Use By-Law [LUB] and Generalized Future Land Use Map [GFLUM] of the Town...;

(c) The decision... is unfounded, arbitrary, unreasoned, regressive and is tantamount to a decision on the part of ... Council... to ignore and circumvent its own Municipal Planning Strategy."

Upon request from a press photographer, and with the consent of all counsel present, the Board used the first portion of the convened hearing to establish a photo opportunity from any members of the press to take such still or moving photographs as press people might find necessary for their purposes. After the flashing of bulbs ceased, the Board requested that the further taking of any type of pictures cease for the duration of the hearing so as not to disrupt and distract the Board in its further conduct of the hearing. The press present graciously acquiesced in this request of the Board.

Counsel also agreed that Mr. Wilson, upon his undertaking to adduce evidence as to status of his clients during the hearing, could immediately participate in the hearing without first adducing evidence to qualify one or more of his clients **ROBERT NAYLOR, DAVID CLARKE, BYRON CLARKE, ODETTE HENDERSON** as an "Interested Person" under Section 27(4) of the **Municipal Board Act.**

Counsel agreed the Board had jurisdiction to hear the appeal.

All jurisdictional facts necessary to establish the Board's jurisdiction to hear this appeal on its merits have been proven to the satisfaction of the Board, and the Board therefore determines that it has jurisdiction to hear this appeal on its merits.

The subject land to be rezoned is graphicly represented on Exhibit R-22 (which appears to be a segment of an L.I.R.S. map) and is locally referred to as the "Watt property". Outlined in both red and black on that map, it seems to contain all the street front portion of lot # 984377 and a sliver of the road frontage of adjacent lot # 984351. On the viewing of the site (and shown indistinctly on Exhibit R-22) the lot appears to be defined by discernable borders of mature trees. An imposing brick "mansion" type house is located towards the rear third of the lot approached by a long driveway leading north from the West River Road. Well cultivated lawns surround the house and stretch between the house and slopes down to the West River Road which is a principal access to downtown Pictou. The site is about 1.5 acres in size. Adjacent to it, towards downtown Pictou, is another similarly situated property constructed in the same brickwork owned by one of the Intersted Parties. A motel is located across the main street from the subject property slighly further away from downtown Pictou. A liquor store and other commercial establishments are located on the main street (West River Road) in a noticeable degree of proximity of the subject property.

Mr. Langley for the Appellants (the developers and unsuccessful applicants to the Town) called as his witnesses William Ian Robson, David Steele, Terrance Brown, Michael MacIntyre, Allan B. English, Robert Watt, James Chisholm, Lawrence LeBlanc, Dan Talbot, Michael R. Babinet. Ms. MacDonald for the Town called Basil MacLeod, David Steele (a repeat), Mayor Ernest A. Jordan, Teresa Gallant, Kate Kennedy, and Ralph Ferguson. Mr.Wilson, for the Interested Parties called David Clarke and Donald Mason. As contemplated by Section 27 (3) of the **Municipal Board Act**, the following members of the public, namely, Archibald Cameron, William Muncie, Gordon Young and George Bedford were sworn each to testify as to his own position on the issues of this appeal. Councillor Ralph Ferguson returned to the stand to testify on his own behalf.

After the formal evidence taking portion of the hearing concluded, the Board adjourned to allow counsel and Board personnel to view the site as a group, the main proceedings being adjourned pending exchange and delivery of briefs and delivery of a written decision.

William Ian Robson, the developer in this appeal, 12 Patterson Street, Pictou, was the first witness for the Appellants. He has lived in the Town for 3 1/2 or 4 years.

Eric Robson, another of the Appellants, is his father. The Watt appellants are the landowners who are selling the subject land to Mr. Robson.

Mr. Robson conducts a real estate and development business. He develops convenience stores and restaurants and combination stores. He uses two development companies in his development projects. In the past 8 or 9 months, Mr. Robson said his companies were pushing development in the construction of retail outlets under the name of "Dandy's Retailers", a convenience store-restaurant-video store combination.

Mr. Robson has had several years experience selling real estate in Pictou County and for the previous three years had been employed by the Sobey~~'~~s' orginization developing their "Needs" franchise convenience store programme.

For some time, Mr. Robson had felt the Town had been underserviced in certain areas of interest to his companies and he had been canvassing the inventory of available real estate within the Town to find properties which would be suitable for his companies to develop. He felt there was a market to be served by the development of a convenience store-restaurant-video store facility at or near the main entrance to the Town itself. For over two years, Mr. Robson had looked for such land which would be both usable and available: he found the market place was limited in terms of availabilty of such land. In March and April of 1987, Mr.

Robson became fully involved in an intensive search for land anywhere in the Town and he scanned all the Town with his objectives in mind.

In his search for suitable land, Mr. Robson paid particular attention to the Downtown Area. He found much of the Downtown was already developed. That which was not developed was broken into lots (not in common ownership) which were "not really large enough" to satisfy the type of retail development as proposed by the witness. The Downtown Area lots were short of the space required for parking for the developments proposed by Mr. Robson. Economic costs of purchasing sufficient Downtown land for his purposes satisfied Mr. Robson that there was no land, Downtown, available satisfactory for his purposes.

His next search started at the Rotary on the outskirts of Town and followed the main street leading into Town (West River Road). He looked for land which would meet his criteria for successful development. Mr. Robson had approached Mr. Watt in April of 1987 with the purchase of the Watt Lands in mind. At that time , Mr. Watt, according to Mr. Robson, did not want to sell or list his property. Later on (June 1987) Mr. Robson discovered that Mr. Watt had listed his property for sale whereupon he entered into an Agreement of Purchase and Sale with Mr. Watt for his property. The agreement was conditional on the success of rezoning of the subject land from R-1 to C-3.

Mr. Robson felt that, having consulted the District Planning Commission (DPC), the area for future use would likely be conducive to C-3 zoning and C-3 zoning would support his development intentions.

According to Mr. Robson, the Watt property was suited to his schemes because of the following factors:

1. visibilty,
2. location at major entrance to the Town,
3. an appropriately high traffic count.
4. priced with these factors so that the development made economic sense to Mr. Robson.

The Agreement for Purchase and Sale for the Watt property called for a closing on November 20, 1987. This closing date was extended to December 31, 1987 and later to April 1, 1988. The extensions of time were made between the parties to accommodate the zoning process. Mr. Robson said the rezoning process was taking more time and engendering more opposition than he had anticipated or that he had been led to believe from information which he had received from the DPC prior to commencing his application to rezone.

Mr. Robson had attended and actively participated in all advertised meetings of the Town's Planning Advisory Committee (PAC) and Council which had dealt with the rezoning application.

At the time of this hearing, the Agreement of Purchase and Sale of the Watt property was still in effect and the completion of the agreement was dependent only on the resolution of this appeal by the Board, with the Board deciding the appeal in favour of the Appellants and ordering Council to rezone the subject land as asked for by the Appellants.

Under cross-examination by Mr. Wilson, Mr. Robson said the type of market study he does in searching for suitable locations for the type of development he engages in is all done "inhouse". Mr. Robson said he made himself familiar with the planning documents of the Town through inquiries with the DPC. Mr. Robson was particularly satisfied with the situation of the Watt's property on the GFLUM. (Map 5 in Exhibit R-11 according to Mr. Robson.) Mr. Robson conceded that some, perhaps the major portion, of the Watt property lay outside the Highway Commercial designation on the GFLUM.

Mr. Robson believed that there were adequate municipal services to service his development on the Watt property.

Ms. MacDonald conducted the second cross-examination of Mr. Robson.

Mr. Robson, pursuant to questions by the Board, said there were no informal neighbourhood meetings held for the purpose of informing the Watts' neighbours of the details of the proposed development. Mr. Robson felt he could not develop his proposal on the Watt property if his rezoning were restricted to the front 1/3 of the property.

On re-examination by Mr. Langley, Mr. Robson said that he had circulated a questionnaire among the townspeople seeking their comment on his development proposal, that the questionnaire elicited a high rate of response, with the proposal being much favoured in that rate of response. According to Mr. Robson a contra-questionnaire was being circulated at the same time as was his questionnaire by persons opposed to the rezoning. He said he had challenged the opponents of the rezoning to publish the results of their survey but he believed those results have not yet been made public.

Mr. Langley put another copy of a GFLUM for Pictou (Exhibit R-12) to Mr. Robson. Mr. Robson confirmed that part of the Watt property shown on that map was outside the Highway Commercial area on that map and fell within an area designated Residential. Mr. Robson felt that he had been advised that the Watt property was not located in an area "rezonable" by Development Agreement. He felt any such area was further east of the Watt property - towards the Downtown Area.

David Steele, Town Clerk and Treasurer, 4 Cottage Street, Pictou, testified next and said that he had been employed in that and subordinate capacities with the Town for 15 years to date. Mr. Steele said he is familiar with the planning process in the Town and, in particular, with the development and use of the process from 1979 to the present. He said he attended all public hearings and public meetings on planning in the Town held in that time interval as part of the duties of his employment. He said he attended all Council meetings as a regular part of his duties.

Mr. Steele said the Town's MPS (Exhibit R-13) came into place March 31, 1982. The Town's LUB (Exhibit R-14) was concommitant with the MPS. He said the GFLUM forming Exhibit R-12 accurately represented GFLUM contained in the Town's MPS.

The Board here interjected and noted that it doubted the witness had been qualified to make such a judgment. The Board noted that his occupation as Town Clerk empowered him to certify the accuracy of certain documents, but that he had not yet been otherwise qualified to interpret plans or to choose between plans.

Mr. Langley then rephrased his question thusly:

[THE BOARD has taken several quotations from the tapes in the course of this decision although it has no complete transcript of the proceedings. Some excerpts from the evidence are included in the main body of the decision. A fuller context of many of the excerpts may be found in Schedule "B" to the decision]

"Q.In your role as Town Clerk, then, Mr. Steele, would you be able to certify that as a copy of a plan that appears in the 1982 Municipal Planning Strategy?

...

A. This would be the original. There is one difference between this map and that one that's there. This would be a copy of the Future Land Use Map that is with the Municipal Development Plan which is [Interjection by THE BOARD R-13] yes.

Q. Maybe I can hold this up, Mr. Chairman, so we can all see it? By comparison this particular plan you've taken from Exhibit R-12, I believe, R-13? is this the same in all material perhaps you can coach me from the bench as to which Exhibit we have here is this the same in all material respects to R-12, and if not what in what respect do they differ?

A. Well, to my knowledge, the only difference is is that on this map there is a highway commercial area shown here, and on this area there is not and this is the original, ah Future Land Use Map, ah that was with the Development Plan approved in 1982.

...

THE BOARD: No.Or he's usin', I'm assuming there would be a similar copy back here so that R-12 is not part of any MDP or MPS that you've proven yet.

Q. Not as a 1982..?

THE BOARD: No, no. I just want to make sure my thinking is straight.

Q. So just to clarify that, then we might, Mr. Steele, you say this R-12 represents the original Generalized Future Land Use Map of 1982 with the exception of the small Highway Commercial Zone to the left of the larger egg-shaped Highway Commercial which includes the Watt property?
A. Yes.

Q. And do I take it that the one change reflects some zoning application made since 1982?
A. Yes, with a plan amendment that was made since 1982.

Q. Would that reflect in the minutes and so on? The meetings of Council since 1982?
A. Yes, it would.

Q. Having introduced the original plans, have there been changes to the MPS, the Municipal Planning Strategy for the Town of Pictou, since 1982?
A. Yes there have.

Q. And, ah, when have they taken place?
A. I couldn't give you the date. That amendment you see on that present map right there in 1986 there was an amendment, I believe it was June 12 it was approved on June 12, 1986.

THE BOARD: That's ministerial approval is it?

A. Yes.

...

Q. Do you have copies of the various minutes of Council pertaining to the appeal process?
A. Yes.

THE BOARD: What's this a series of minutes of Council?
Mr. Langley: A series of minutes of Council pertaining to Pictou Municipal Planning Strategy.

THE BOARD: I take it these are relevant, are they?
Mr. Langley: Yes , quite relevant.

THE BOARD: That would be what , R-15.
Mr. Langley: R-15.

...

A. They are a series of ah of copies of minutes which led to a plan amendment. Town Council had an application for rezoning and proceeded to amend the plan so that the rezoning could take place, and these are copies of the minutes for the Planning Advisory Committee met and technical reports from the planning, the Planning Commission, and the amendment that was made to the Planning Strategy. Also the advertisement that was placed in the local paper for the amendment.

Q. Does that exhibit contain all the minutes to your knowledge that for main meetings during that period?
A. Yes, I would say that all the minutes pertaining to this amendment are here.

...

Q. And is this the most up-to-date copy of the MPS for Pictou?
A. Yes, it is.

THE BOARD: R-16?
MS. WHITE: Yes.

THE BOARD: Now what is this we've got? We've got an MPS up here under R-11. Is this another copy of that same thing? It has got a different colour backer on it. Or is it an up-to-date one and the R-11 is a ...
MR. LANGLEY: This should be the same as R-11...

THE BOARD: If it is the same as R-11, why bring it in?
MR. LANGLEY: O.K.

THE BOARD: You know, I am not restricting if you want to duplicate or triplicate you're entitled as a matter of law to bring it in, but I can't see the point. I'm going to be confused enough anyway by the time I finish with three lawyers.
A. If I could just take a mmcment to check R-11...

THE BOARD: Don't count on it. Putting two MPS's in...

MR. LANGLEY: If I may proceed?

THE BOARD: Yeah ah yeah. Have you decided whether you can use the one... or do you want to use the second one but bring it in. God help us if there is discrepancies, that's is all I'm..,
MR. Langley: At the risk of confusing the Chairman, I don't think that is really going to be a problem.

THE BOARD: Yeah.
MR. LANGLEY: There is a difference in the map.

THE BOARD: Isn't that what [sigh] all right... Well, you put it in. This is the same fellow that certified the last one.
MR. LANGLEY: I didn't have a chance really to...

THE BOARD: No, I realize that,
MR. LANGLEY: Well I'll direct my questions to...

THE BOARD: Well, you know, his certification may be wrong. I don't know , in which case I don't know where that leads us.

Q. Well, just to go back into this again, to try to clear this up Mr. Steele, R-11 was introduced just earlier as an exhibit representing the most recent MPS for the Town of Pictou?
A. Yes, it was.

Q. The map taken from that text has been introduced as Exhibit R-11 as well initialled J.W. Can you tell us if the text, first of all, if the text of R-11 and the text of R-16 are materially different?
A. The text, I would have to say "No".

Q. Now having read through both copies, both are updated, have the same up-date on them, and they come from the Planning Commission as being accurate as of November 18, 1986. What is the difference, if any, between the two plans?
A. Well by the look of the maps there that came from R-11 it wouldn't be the same as the map, the Future Land Use Map, that comes from R-16. Just as recent as this morning, I was informed that by the executive director of the Pictou County

District Planning Commission, Mr. Brown, that there is an error on this map. This Highway Commercial Zone which extends east to the Town should have been should have not been extended. Should just have been left the same as it was on the original map.

Q. Now the original map, perhaps you can see it here?
A. Right.

Q. Exhibit R-12, you refer to as the original map?
A. Yes.

Q. And you are saying that the map included in the amended version of the Planning Strategy is different in what respect, again from R-12?
A. Compared to this?

Q. Compared to Exhibit R-12?
A. O.K. The map produced with the Exhibit R-11 has the shows the Highway Commercial Zone extended east into the Downtown where it should remain the same on R-12.

Q. That extension as reflected on R-11 shows a single Highway Commercial Zone opposed to two?
A. Yes.

Q. And, ah, to your knowledge does the extension of that Highway Commercial Zone in any way affect the Watt property through its location and so on?
A. No.

Q. The Highway Commercial Zone which is extended ah its a designation which allows the development of the property as Highway Commercial through development agreement with the Town. That has been extended eastwardly to include the property on both sides of the West River Road right into High Street and is that change that was brought about in the amending process in 1986?
A. Yes.

Q. So that just, again, to be perfectly clear there is no real plan change then in the plan itself or the map itself as a result of that amendment?
A. No.

Q. And the plan is that exist and that exists[ed] then is R-12?
A. Yes.

Q. With the exception of that one Highway Commercial designation?

A. Yes.

Q. On the left of the area in dispute, so to speak?
A.

THE BOARD: Mr. Langley, before we leave this point I'm concerned, You've brought some history of the plans and the development of the Plan, and I suppose that's relevant. I'm concerned that with what MPS and by what Minister was [that MPS Approved] available at the date the decision was made. Is it the same one that it is today? Which one is it? Which plan is in it? There can only be, as a matter of law, one correct one. I don't care how the plans were fouled up, or what was right or what was wrong. Which is the one that the Minister signed?
MR. LANGLEY: Our submission is that the Minister signed a single MPS which would be R-11.[BOARD Yeah] Originally produced, the text is identical in every respect to R-16.

THE BOARD: And he would have had to sign any amendment?
MR. LANGLEY: That's right. The amendments are made a matter of evidence at this point in that book that has been submitted.[BOARD Yeah, Yeah] and the only plan that has been acknowledged and approved by the Minister is this plan here R-12.

THE BOARD: So that is your position that R-12 is the only one that has been approved by the Minister?
MR. LANGLEY: Correct,
THE BOARD: Yep. And what is this witness saying on the subject as...?
MR.LANGLEY: I think we just tried to confirm any uncertainty about the plan that was introduced with R-11.

THE BOARD: There is an uncertainty in my mind now that I don't propose to leave until it's removed somehow or other and this is the only witness that can do it, isn't it? Because he's the one that has custody of the records.
MR. LANGLEY: The records themselves?

THE BOARD: Yeah. The records themselves. Would it be wise to leave him on that specific point with that specific question in mind and , perhaps, recall him after lunch when he has a chance to make sure what we are dealing with?
MR. LANGLEY: I have no problem with that.

THE BOARD: Other counsel?
MS. MACDONALD: No problem.

THE BOARD: Allright.I ... you know from my point of view I have got to define I don't care if it's totally censored,

but I have got to determine somewhere what is the MPS applicable to this area. There is only one MPS at any given moment.
MR. LANGLEY: Our position...
THE BOARD (interrupting): Is there some...you know your evidence is very careful and very clear but it has shown to me some doubt just what was, what it was..

MR. LANGLEY: If it helps further we will bring Mr. Steele back to make our position totally clear. It is our position that this plan is the only plan that has been admitted. This designated area is the only designated area...
THE BOARD: And your developer is saying that this is the only one he was shown.

MR. LANGLEY: Exactly.
THE BOARD: You know, and I'm not really you know that may be very germane what he was shown but I'm interested from this witness-not the other ones- but I'm interested from this witness who is the fellow in control of the records and has a duty to certify a court copy; I'm concerned that we get the correct copy, and I don't care if it has been burned out, censored or whatever, I want the correct copy. And counsel can get together with this witness and make sure that this witness knows I want the correct copy. I hope I have made myself clear. I have no criticism of you, but there should be no ambiguity of what is the correct copy in force at the time the decision was made, or in force today-which may be three different...you've dealt with '82, we're now dealing with '88 and you're dealing with a decision of '87. There may be three different MPSs. And, so I just want'em...I want it straight before I start.

Q. I take it then there have been no further amendments since 1986?
A. No, there hasn't.

MR. LANGLEY: Since we are finishing out this witness, Mr. Chairman, I suggest we enter the existing Land Use By-law as amended as well.
THE BOARD: Allright. That would be R-17, eh?

MR. LANGLEY: R-17.
THE BOARD: Certified by the same person?

Mr. Steele kept the minutes of all meetings related to the passage of the MPS and the LUB and some of those minutes were presented to the Board as Exhibit R-18.

Exhibit R-19 is a copy of the Technical Report from the Planning Commission that should have been included in Exhibit R-18. Mr. Steele said that Exhibit R-19 is part of the minutes of the PAC meeting of August 12, 1987.

The rezoning application proceeded to public hearing according to Mr. Steele, at which meeting the rezoning request was rejected.

On cross-examination by Mr. Wilson, Mr. Steele had these questions and answers:

Q. Can you tell us, Mr. Steele, [which] one of the MPS Future Land Use Maps would have been available to your Planning Advisory Committee and Council and citizens at the times the application was dealt with? Would it have been R-11 or R-12?
A. Ah, R-11.

Q. R-11? So in attempting to interpret the text of R-11 or R-12 which I think we agree on, you would be working with, at that time, your R-11 map, is that right?
A. Yes.

Q. Yup. In fact it was only this morning that it was brought to your attention that the wrong map that had been circulated?
A. Yes, it was.

THE BOARD: In somebody else's opinion that we haven't heard from yet?
A. Yes, yes.

MR. WILSON: We are just trying to get Mr. Steele off the hook.
THE BOARD: He isn't off the hook yet.

MR. WILSON: I want to produce another exhibit
THE BOARD: R-20?

MR. WILSON: Yes.
THE BOARD: What does that purport to be?

MR. WILSON: It purports to be the amendments to the MPS and Land Use By-law, as certified by the Minister, in 1986 and as earlier referred to just the amendments taken out of the context of the strategy to help to deal with a couple of issues.
THE BOARD: Have you shown that to counsel for the other side?

MR. WILSON: I have already with a binder of the exhibits that I intend to use and they probably [can] turn to Tab 5 in that and they could probably to all exhibits.
THE BOARD: You want R-21 which is your booklet blue book , blue book,

Q. Please, Mr. Steele R-20 look at that and see if you what form you recognize those documents in?
A. Yes.

Q. That represents the textual document of the last amendments to your Strategy and Land Use By-law, is that correct?
A. Yes.

...

THE BOARD:...You have been called on, I take it, by various parties here to, again in your function of Town Clerk, and pursuant to the Evidence Act to certify various documents?
A. Yes.

THE BOARD: As being accurate and correct? Do you understand now that one must compare those documents before you certify them, not afterwards ?
A. Yes.

THE BOARD: Because, you see, tribunals such as this, courts such as this, rely automatically and are required to admit automatically those documents when they come and, ah, it's very dangerous if if if [stutter] a question comes up that we have to resolve and can't resolve because there is some inaccuracy. There is no sin, there is no crime, but the boards rely extremely heavily on the accuracy of the certification. So the tedious job of comparison has got to be done before they're produced and certified. Anything arising out of that?

...

A. Well, on that, on that plan, not really, but if we could look at this Plan, R-12, ah I believe it was the intent of PAC and Council when they were making the amendment to the Plan to ah extend the Future to extend this Highway

Commercial Zone on the Future Land Use Map along West River Road into the Business District to the Town so that Highway Commercial development could would be allowed along that area through development agreement from [THE BOARD Sort of an extension south-easterly?] Yes. of this map R-12 excluding this original Highway Commercial designation.

Q. And what, how was that left, or was it changed at all? The original Highway Designation?
A. Ah, It was left as it is.

Q. And, ah, do you know what, what requirements if any there are for one area versus the other in terms of direction?
A. In this area there is no requirement for a Municipal Development Plan. Excuse me , for a development agreement. The original area of Highway Commercial. In the extended area in the amendment, in the extended area, there is a ah, subject to development agreement.

Q. Do you know if the uses, the Commercial uses are more restricted in that area?
A. Yes they are.

Q. In terms of numbers...?
A. I would say I think that there are six uses listed in the amendment and there are ten uses listed in the original zone.

Q. Ten listed uses for the original highway Commercial Zone?
A. Yes.

Q. And you say six for the extended zone? Is that right?
A. Yes.

Q. And to your knowledge of the location of the property subject to this rezoning, does it fall within the original zone or not?
A. Yes, part of it falls within the original zone.

Q. Does any part of it fall within the extended Commercial Zone towards the south east?
A. Ah, I would say "not". I would say that the extended zone continues on from the easterly boundary of the original Highway Commercial Zone.

Q. And you attended all these various meetings regarding the amending process, is that correct?
A. Yes, I did.

Q. Ah, you can't read their minds, but you can perhaps make observations, was there confusion at the time of the

amendment as to what this amendment was all about on the part of Town Council?
A. No.

Q. That's all my questions.

THE BOARD. I guess that's 5 to 12. Ah, thank you very much. Duh, You'll be checking to identify from this witness what's right and what's wrong in the MPS. Counsel, I take it, can take it under advisement. I think we'll adjourn 5 minutes early and, what, 1.30. I don't think it is likely we are going to finish today, is it?
...We left just before lunch were you able to reconcile the MPSs among agreement of counsel, It would be easier if we did, or is there still a difference?
MR. LANGLEY: There may still be a difference, you will hear from all counsel on it when we get into the issue. According to Mr. Steele, the Town Clerk, at the time the amendments went through in 1986 there was the original plan which is reflected here in Exhibit R-12 ('82) and in 1986 the only amendments that went through pertained to the written text. There is no submission of any new plan, as such, for approval, but the Minister at that time, that is the approval of the plan such as R-11, I believe it was,

THE BOARD: See, my problem is what did the Minister sign? There are plans in the MPS. That's what he signed. If so what plan was there?
MR. LANGLEY: Well, Mr. Steele's recollection is that there was simply texts. We can find out more on that subject through the Planning Commission who is here to address that as well.[THE BOARD:Allright] But our position is that based on what we have been told that is the situation as far as the approval is concerned.

THE BOARD: The MPS definitely contemplates the plan as being a part of it, and it has been represented to me this morning that these plans are part of the MPS.
MR. LANGLEY: And we hold out just the one plan. It doesn't do avoid the fact that there was a second plan kicking around.

THE BOARD: Kicking around! Yes I...
MR. LANGLEY: Where it came from, how is something else...

THE BOARD: So the problem is not resolved yet?...
You're hoping I can understand it before you finish. You see, my problem, I got to first find what the MPS is before I can check intents against it.
MR. LANGLEY: I understand.

THE BOARD: And what would be your position if there was no, in fact, no MPS? Would there then be no planning control? Have you contemplated from that point of view?
MR. LANGLEY: I don't want to even think about that, right at this moment.

THE BOARD: 'Cause that might be the result. If there is no MPS there may be no planning controls, which I suspect some people might not be satisfied with.
MR. LANGLEY: Well I'll address that later on. I call Terrance Brown."

Terrance Orville Brown, New Glasgow, executive director for the Pictou County District Planning Commission(also"DPC"), with whom he has been employed since 1982, next gave evidence for the Appellants.

Mr. Brown has been successively, a municipal planner, a senior planner, and most recently the Executive Director for the DPC. He has a Master's degree in Urban and Regional Planning from the University of Waterloo. Mr. Brown, in his various capacities, has been involved in the preparation of Plans for the various municipalities in Pictou County.

Mr. Brown said that the Town's MPS (then it was called a Municipal Development Plan or MDP) was first adopted in the late 1970's and the Zoning By-law (now LUB) in 1982 and marked Exhibit R-14. He says that MDP was Exhibit R-13.

Mr. Brown was asked if Exhibit R-12 accurately represented the 1982 MDP. On this issue he testified as follows:

A. Without detailed examination, I would say "Yes", with one exception, that the area on the west side of the Highway 106, an amendment approved back in '85 or '86, I've forgotten the date, which extended Highway Commercial Designation to the other side of the Rotary if you like.

Q. Are you referring, perhaps, to this area here I have circled with pen?
A. Yeah.

Q. That did not appear on the original plan?
A. It did not.

Q. That's been a subsequent addition to the plan?
A. Yes.

Q. The area of concern to this application, the somewhat large oval commercial area off the Rotary, was that part of the original Plan as of 1982?
A. Yes it was.

By consent of counsel, the Board accepted Mr. Brown as an expert in planning entitled to give opinion evidence in planning matters as they affected the Town.

Mr. Brown then reverted to the differences in the Town's plans in these exchanges with Mr. Langley:

Q. Now you've heard the evidence that preceeded your own about amendments that were made to the MPS back in 1986 or subsequent to that time. Perhaps with your help we can clarify any confusion that arises as regards to the plans that have been submitted as a result of that process. Were you directly involved in the amendment process in 1986?
A. I was.

Q. You attended meetings of Town Council during that time to deal with the subject?
A. Yup.

Q. And, ah, I am not sure if you have the exhibits or not, there is a packet there of Exhibits containing all the minutes of the various meetings, R-15. Would you take a minute to look at that Exhibit if you would, Mr. Brown, and perhaps confirm or otherwise tell us if those minutes reflect all the meetings that were held during that time?
A. I would have to say "Yes" to that question.

Q. I think to simplify things would you, in your own words, take us back to what initiated the amending process at that

time, what got the ball rolling, and what was addressed in summary fashion, if you can, in terms of amending the existing Plan?
A. O.K. The amendment process began with application from a business know as "Sandy's Inn", the owner was Sandy MacKay, requesting the Council to amend the Zoning By-law to allow an, the expanding of an existing Highway Commercial use known as "Sandy's Inn."
Q. Could you just stop there,...

Mr. Brown advised Council that, to accommodate the application of the Sandy's Inn application, Council had to pass a supporting MPS amendment which he suggested was to extend the Highway Commercial Designation eastward till it reached the existing Downtown Commercial Area. According to Mr. Brown, PAC followed that advice. The advice, he said, was also accepted at Council and sent back to PAC for the actual drafting of the amendment.

In upshot, according to Mr. Brown, some of the confusion expressed today

"was due to the existence of a map in a Technical Report governing the alternative 3 (or alternative "C", I think it was called). The map showed both that designation extending from that egg shaped all the way down to the Downtown Area. But that was not the amendment. The amendment was passed and went through the process. It was passed and went through the process and did not include a redesignation of the area simply because they were willing to allow the use to go in that area from the existing designation through to the Downtown frontage along West River Road by development agreement. The development agreement being a little more flexible for Council to be able to control some of the impacts that that kind of use would have up against or adjacent to existing residential uses."

Mr. Langley continued the questioning as follows:

Q. You have your exhibit there with, I believe, all the attached maps, Exhibit R-15, would you flip into that and

confirm that your Technical Report is included in that packet?
A. It is.

Q. And is your sketch that you alluded to also attached to that?
A. Yes, it is. It is attached after what I called at that time Alternative "C". It's the labeled as Schedule "A".

Q. Is the Schedule attached? It shows a single Highway Commercial area from Rotary to Commercial Core, as you call it?
A. Basically, yes.

Q. Now, again, just to make this more clear, am I correct in inferring in what you're saying that this area remained as C-3 commercial area with 10 designated uses throughout this amendment process?
A. Yes. And the uses would go by rezoning.

Q. And that the amendment process was dealt with land from the east of that area towards the Downtown Core?
A. Yes.

Q. And that the amendment dealt in that area with developing that those sides both north and south or east and west, I guess, West River Road by way of development agreement?
A. That's right.

Q. And that by way of development agreement, I mean there were restrictions to uses that went in that area?
A. There were fewer uses allowed by that process, yes.

Q. Would that amendment process have had any bearing whatsoever on the Watt property as such?
A. In my opinion, "No" , but the Watt property is in the Highway Commercial Designated area on the Generalized Future Land Use Map.

...

Q. O.K. Can you explain to the Board how this map may have been come into being, given those comments? This is, I guess, R-11.
A. Yes. I believe that that technical error on the part of the planning staff, uhh, in responding to [unclear] the amendment, or proposal for amendment, called "Alternative C", I think the confusion existed at the time the map was adjusted correctly those maps may be floating around completely in error. That designation was not approved by the Minister, although it was talked about back at the Planning Advisory Committee level.

Mr. Brown was then cross-examined by Mr. Wilson. He reiterated that portions of the Watt property were included within the Highway Commercial Designation on the GFLUM but the majority of the Watt property lay outside the C-3 designation.

Mr. Brown felt that in a designated area rezoning to the approriate designation would be an "automatic process" with certain limitations imposed by the criteria imposed by the MPS. He thought the intent of the MPS was to allow the properties fronting on West River Road to be considered for Highway Commercial Use either by rezoning or by development agreement, which process to be used would be determined by where on the GFLUM the property in question was situate in relation to the Highway Commercial Designation.

Mr. Brown agreed that the rezoning process where it applied, was a much more mechanical or "automatic" process with a broader assured result than was likely under the development argreement approach-where it applied. Council, in the development agreement approach, had a much wider discretion whether to grant the agreement, and also as to the final effect on development the agreement might have, even if it were to be granted.

Ms. MacDonald cross-examined Mr. Brown next. He said that the Town Clerk sends the amended MPS into the Minister of Municipal Affairs for his formal approval.

In response to questions from the Board, Mr. Brown said the MDP was passed in 1982. That was amended in 1985 and again in 1986. In his opinion R-12 is the GFLUM which is validly incorporated in the presently valid MPS of the Town. Mr. Brown believes that R-11 was, and is, "in error".

Mr. Brown said he was employed by the DPC and not the Department of Municipal Affairs. He said the DPC was responsible for the planning needs of the Municipality of the County of Pictou, Pictou, New Glasgow, Stellarton, Trenton, and Westville.

On re-examination, Mr. Brown said that the designation lines on the GFLUM are not "fixed" but are intended to be guides as to general areas of interest as opposed to the fixed lines established for zones in the LUB. He said the MPS intended that Council could rezone properties adjacent to the areas designated on the GFLUM without going through an MPS amendment.

Michael Andrew MacIntyre, New Glasgow, municipal planner with the DPC, after a voir dire as to his qualifications, next qualified as a planner competent to give opinion evidence on planning matters as they affected the Town. Mr. MacIntyre said the Watt property was designated [zoned] residential (R-1) which zoning prevented the proposed use of the property. He agreed there was a policy in the MPS which allowed the whole of the Watt property to be rezoned to C-3 although only part of the property fell within the Highway Commercial Designation on the GFLUM.

Mr. MacIntyre felt the proposed rezoning met all the rezoning requirements of the MPS. He was the planner who prepared and presented to Council the Technical Report in order to inform Council of his professional planning advice concerning the present rezoning application. Exhibit R-19 contained that Technical Report to Council which was dated August 12, 1987. He then went on to say:

Q. And what plan, if any, were you basing your report on at that time?
A. I was basing my report on the current Municipal Planning Strategy of Pictou which most recently been amended in 1986.

Q. O.K. Were you familiar with the amendments that took place to that plan in 1986?
A. Not prior to this application.

Q. You weren't involved at that time, yourself, in those amendments?
A. No.

Q. Ah, did you study the amendments in the process prior to making your Technical Report in August of'87?
A. [Ms. Macdonald's cough obliterated the answer]

...

Q. Now, just again, so as there is no uncertainty or confusion about the thought process that was involved here, ah, there has been reference made to the R-11 map of questionable origin I would suggest, and the R-12 map, the Generalized Future Land Use Map for the Town. In making your deliberations preparatory to this report, what of the two maps did you deal with or refer to?
A. I was dealing with R-11.The lower map. That was the map I believed to be the current map.

Q. And what is your understanding of this zone as shown on the original Generalized Future Land Use Map, at the time, was it or was it not, in existence?

A. I was aware that that was the originally designated Highway Commercial area, that was the original map.

Q. And was that zone still existing at the time you made your report?
A.(indistinct) qualify that. Amendment prior to ah on the west showing Highway Commercial Designation and on the west of ah the larger portion I was not aware of that one. I was only aware of the 1982 original Generalized Future Land Use Map.

Q. O.K. But when you made your Technical Report up, when you researched this for preparation for giving your report, were you aware of the fact that this Highway Commercial Area here, the area in question, was still a designated zone on the Generalized Future Land Use map this map for Pictou?
A. Not in that form.

Q. In what form did you contemplate it when you were making your report?
A. I understood that the current maps showed the designation all the way from the Highway at the Rotary to the Downtown of Pictou as shown on Exhibit R-11.

Q. So you referred to R-11 when you were drafting your report?
A. Yes.

Q. And did you attach a copy of the map sheet to your report when you were making a report to the Town.
A. I didn't include a copy of the Generalized Future Land Use Map with the Technical Report, no.

Q. Is there a copy of the map sheet attached to your report?
A. The Technical Report has the reference map showing Pictou's zones on it.

Q. So, that is page 4 to your Technical Report?
A. Well, yes, it would be page 4.

Q. And that's just a portion of the zoning By-law map, for Pictou?
A. Yes. It's a representation thereof.

Q. Now under the technical assessment portion of your report on page 3, you refer in the second paragraph to the Town's Municipal Planning Strategy suggesting that this area of the West River Road was originally designated for Highway Commercial Use, is that correct?
A. Yes.

Q. Did you contemplate, or discuss with Council at the time, the necessity , if any, of having a development agreement for this site?
A. The issue did come up at PAC whether a development agreement would or would not be required, or whether it could be accommodated by a straight rezoning.

Q. In your opinion, was it a development agreement necessary at the time?
A. Based on my interpretation of the policy and the intent [indistinct] generated the amendment I felt that a straightforward rezoning was all that was intended for this portion.

Q. Where, in the sense of R-12, would a development agreement have applied, if anywhere?
A. According to R-12, the development agreement portion would be roughly where that Highway Commercial Designation ends on the east or south east if you prefer and the Downtown the beginning of the Central Business District on West River Road.

Q. It would extend eastwardly from the eastern boundary of the existing C-3 area easterly to the Downtown Area?
A. Yup.

Q. And that area would normally be one where a development agreement would apply?
A. Yes. for selected uses.

Q. Was that discussed with Council at that time?
A. I submitted that to Council, in a separate report.

Q. Is that the Staff Report that is attached to the Technical Report?
A. Yes, it is. Well, actually, I don't have a copy of in evidence of ... I'm sorry it's underneath O.K. with the minutes, now

THE BOARD: You do have a copy of that Staff Report, then?
A. Yes.

THE BOARD: What exhibit is it in?
MR. LANGLEY: R-19.
A. R-19.

Q. If you could just refer to that Staff Report for a minute?
A. Yes.

Q. Was that report given the same date as the Technical Report?
A. Yes, it was.

Q. And was it from that Staff Report that the [indistinct] ensued about development agreements, where they're necessary and where they're not?
A. I don't believe there was lengthy discussion on the question of interpretation. There was, it was generally agreed that my interpretation as shown in my report was acceptable.

Q. That seemed acceptable at the time?
A. Yep.

Q. Is there any confusion in your mind or uncertainty about whether or not you were being accepted in terms of the presentation of your report?
A. I am not quite sure what you mean.

Q. Was there any uncertainty in your own mind that you were understood by those to whom you addressed the report as to your recommendation and the reason for it?
A. I can't really speak for PAC members. You would have to ask them.

Q. Well, based on your discussion, you were there, what did you see and hear?
A. There was no ah significant debate about the question of whether a development agreement would be required or whether a straight rezoning was appropriate.

Q. O.K. Can you tell us what gave rise to the introduction at the same time of the Staff Report?
A. The Staff Report was generated by myself and originated with me because of the map I understood to be the current adopted map for Pictou.

Q. Are you referring to R-11?
A. Yes, R-11. Created some confusion to my mind as to what provisions were actually in the Policy-4, the different types of uses.[THE BOARD: You too.]

Q. O.K. And with that as a background, what did you intend to address in your report in August of 1987?
A. I attempted to establish what area was in fact intended to be dealt with by development agreement and which area was to be dealt with as originally found in the plan by a straightforward rezoning. In other words, what was the actual basic Highway Commercial Designated Area and what was the Development Agreement portion of West River Road.

Q. I take it, you were at least aware of the existence of R-12?
A. Only in its original form. R-12 was, I did not realize that that was still that original page "A" , designation was still the current designated area.

Q. Had you seen anything to suggest that it was changed? Had you seen a different plan that was approved by Ministerial approval or any suggestion to the contrary?
A. I hadn't seen anything, any specific reference, to the change in the amendment pack, only that map that I assumed was the result of that amendment.

Q. O.K. Well, this referring back to R-11 again, are you?
A. Yes.

Q. Recognizing this may have been the map, Generalized Future Land Use Map you thought that was in effect at the time ?
A. Yes.

Q. What was your understanding of the Planning strategy vis a vis the entire area shown on the map?
A. I concluded, given the intent of the amendment and the policy, that Council had intended for the originally designated area, that is egg shaped portion which would end probably at the Watt property, was intended for rezonings and beyond, between that point and Downtown would be intended by development agreement.

Q. Is that in fact what reflected in the map that you attached to your Staff Report?
A. The map which I attached to the Staff Report see essentially what I thought was the intent. Essentially that should be a distinguishing line between the Higway Commercial Area and the special development agreement area. It was purely for, it is purely diagrammatic, for demonstration purposes.

Q. Well, what would you have had the map look like ? You say that is the map you were dealing with at the time. Were you attempting in the process to, if I can refer Chairman and others present, the map attached to your Staff Report. Were you suggesting at that time that the pictoral reference to the whole area be changed to reflect what you have on your map sheet?
A. Well, to actually effect the intent of the amended policy given that now the line would be required to separate the two designations.

Q. That's right, and that would be just off the fringe of the area we're talking about today, is that correct?
A. That were, in fact, proper now.

Q. So if the map were amended in the sense that you contemplated, you would show what in fact you have sketched out and attached to your Staff Report on this existing map?
A. Yes.

Q. Is that not in actual fact what does exist, given the Municipal Planning Strategy of Pictou at the present time?
A. In the context of the proper map [indistinct] speaks quite clearly to the true intent of where the portion of West River Road where Highway Commercial Uses are required to go by development agreement.

Q. And your understanding of that area would suggest what restrictions if any on a C-3 designation?
A. What restrictions on the designation?

Q. What designated uses would be permitted in one area and not in the other?
A. In the development agreement area there would be, I believe, six select uses, commercial uses which would be approved subject to agreememt with the Town.

Q. And in the area deemed C-3?
A. That would be subject, uses would be permitted as listed in the zoning By-law for a Highway Commercial C-3 zone.

Q. And how many in number are they?
A. I believe there are ten.

Mr. MacIntyre felt that the C-3 rezoning would permit the uses sought by the Appellants. He had highly recommended the rezoning to Council and has still the same opinion at the present hearing.

Mr. MacIntyre was cross-examined first by Mr. Wilson. He admitted that his report stated there were "vagaries" in the MPS. He felt that the Watt property was an acre and one-half rather than an acre as mentioned in his report. Mr. MacIntyre agreed that the property, had it been rezoned could have been used for any of the C-3 uses and was not restricted to those C-3 uses which had been proposed for the subject property by the Appellants, the "worst case scenario", so-called.

There was no report of a Development Officer made regarding this rezoning application to Council and Mr. MacIntyre said the requirement for such report was on page 70 of the MPS. Mr. MacIntyre said he had contacted the Town's Superintendant of Works about the capability of the "hard services" (sewer and water) to handle the development that was proposed before preparing his report for PAC and Council. As a result of those inquiries, he determined that further inquiries should be made by those bodies into the suitability and availabilty of hard services for the proposed development.

Under cross-examination by Ms. MacDonald, Mr. MacIntyre demonstrated how he determined his opinion of true intent of the MPS.

Under questioning by the Board, Mr. MacIntyre felt that the MPS precluded any development agreement change in the area designated for a C-3 zone on R-12.

Mr. Langley then called Allan Frederick English, 101 Denoon Street, Pictou, a resident of the Town for 42 years less 10 years while away in military service. Since 1972 he has lived in the Town.

Mr. English said he had been involved in the planning process for the Town since the late '70s. He is a businessman involved in the tourist business. As part of his civic duties, Mr. English is a member since 1978 (and current chairman) of the PAC.

Mr. English said he was familiar through his duties as a member of the PAC with the 1982 MPS and all subsequent amendments thereto. As to the specific content of the MPS to be applied to the present rezoning application, he had this to say:

Q. You're able to comment on those various subjects?
A. As best I can, yes.

Q.There has been an awful lot of discussion during the past few hours about ah the Municipal Planning Strategy and the Generalized Future Land Use in Pictou. Are you familiar with, first of all, the Strategy and the Generalized Future Land Use Plan as adopted in 1982?
A. I am.

Q. And can you tell us if this Exhibit R-12 reflects the Generalized Future Land Use Map dating back to its acceptance by the Minister in 1982?
A. It does except for the small area to the west of the egg shaped area.

Q. You're looking at this smaller Highway Commercial area just off the west portion of the area of concern?
A. Yes.

Q. And was that a subsequent amendment to the plan, do you know?
A. It was, yes.

Q. Were you involved with that amendment?
A. Yes.

Q. When the initial plan went through in 1982, I take it there were meetings with your committee and Council for public hearings, that sort of thing?

A. Many.

Q. Were you present for most of those?
A. After I was appointed to the in fact even before I was appointed the public meetings and after I was appointed I attended all of them.

Q. Of course at that time you were discussing the whole strategy, all facets of planning in the Pictou area, not just the zoning per se?
A. Yes, quite comprehensive.

...

Q. O.K. Now since the plan came into effect in 1982, and I guess maybe I have asked you this before and I will ask again, is this the plan to your knowledge which went through Ministerial approval in 1982? Except for that area there, eh?
A. Ah. I have the original copy in my book.

Q. Were you involved with the amendment process that happened with the MPS subsequent to 1982?
A. Since 1982? Yes.

Q. Can you tell us how that came about, what initiated the amendment?
A. That was an application by Sandy's Inn to rezone an area adjacent to their motel.

Q. If I could just stop you there, I believe this witness has marked the map with an "S" just to the east of the egg shaped area. Would that be the location of Sandy's Inn?
A. Yes.

Q. O.K. Carry on.
A. Ah, It was, I believe, my suggestion that rather than just do that particular property encompass all of the area from High Street west to the Highway Commercial area and include it in that amendment rather than just doing the particular one for Sandy's Inn in the anticipation that should other businesses in the area or wish to to expand or some residential property be bought out in the future and some commercial property development be established there that it would eliminate some of the paperwork and time involved to allow this development to occurr without having to amend the Municipal Development Plan further.

Q. Up until that point was there anything done in this area by way of Highway Commercial Designation to your knowledge? That is east from the existing egg shaped area.
A. Prior to that? No. Not that area, no.

Q. What designation did Sandy's Inn have, itself, at that time?
A. I believe it was C-3.

Q. And what was he seeking for his adjacent property?
A. I believe C-3.

...

Q. Now at that time did you see anything other than this particular map by way of Generalized Future Land Use Map of the Town, was any other map submitted to you as part of the amendment process, and, specifically, did you at that time see or refer to this map?
A. No. Today is the first time I have ever seen that map.

Q.Pardon?
A. I have never seen that map before this morning.

Q. That's R-11?
A. Yes.

Q. Do I take it from that comment, that you only dealt with this map, R-12?
A. Ah, yes.
THE BOARD: A variation of it. With a change on it.
MR. LANGLEY: The one that was in the Technical Report was the one that he actually dealt with at PAC.
THE BOARD: If I understand his testimony the map he was looking at was somewhat different by one respect, isn't that correct?
MR. LANGLEY: Apparently so.
THE BOARD: Yeah.

Q. O.K. We'll just take you ahead then. You've described the amending process. You say you are also involved with the application for rezoning by Mr. Robson, is that correct? I take it there were meetings and so on associated with that?
A. Yes.

...

Q. Now there's considerable been said today about the apparent confusion between the maps, applying that confusion to what may or may not have been understood about this application, perhaps. At the Planning Advisory Committee level, did you discuss the merits of the Robson rezoning?
A. Yes.

...

Q. O.K. At this meeting stage was this the only plan you dealt with, you say you haven't seen this plan here R-11 until today?
THE BOARD: He's continually said that he's never seen dealt with that plan, except as it now stands. It's an improper

question to keep puttin' it to him. If you have the plan he considered then put it to him. Or preface your remarks with the question he puts in so he won't ...It's an unfair question on direct examination, I think, to put to the witness. I think if you are using a plan different from the one he said he studied. And putting it to him time after time, that this is the plan that you studied....[lost in change of tape] correct plan there is nothing we can do about it, but that is not a right question to be putting to him.
MR. LANGLEY: I accept that Mr. Chairman.
THE BOARD: Thank you.

Q. O.K. ...

Mr. English belived the MPS allowed for C-3 rezoning on both sides of the West River Road starting with the Watt property and going west to the Rotary. He listed in that area the following commercial uses: Home Hardware, Pictou Legion, and Sobeys. Commercial properties "in the circumference" of the C-3 designated area include Johnson's Motel, Kentucky Fried Chicken, and Nova Scotia Liquor Commission. Outside the zone towards the center of Town (east) there are, according to Mr. English, the following commercial uses: Neighbourhood Canteen, Bonnie's Canteen, Sandy's Inn, Straight's Dairy Bar, a small corner store (Dalton's?), and Liberal Headquarters.

Mr. English conducted the PAC meeting at which the Robson application was discussed. Some members were negative to the application to rezone because they thought the development would be better suited to the Downtown Renewal Area. Traffic was mentioned as a negative factor in the Robson proposal. Mr. English said the PAC meeting was "fairly argumentative" at times. The whole matter was referred to a subsequent meeting of the PAC.

Mr. English said that at the second PAC meeting on the Robson proposal the Technical Report made by Mr. MacIntyre was discussed. There was a discussion of Development Agreements at this meeting, according to Mr. English, and Mr. Robson agreed to consider the use of a development agreement, if such an agreement was wished for by the PAC and appropriate in the circumstances. He said that Mr. Robson would also be agreeable to consider the splitting off of the front of the property for the rezoning and leaving the house at the rear, separate, in its existing zoning.

Mr. English also attended the advertised public hearing which dealt with the Robson rezoning. He said issues of objection to the proposed rezoning advanced by the opponents to the rezoning were based on expressed concerns about traffic safety, adequacy of water and sewer systems to service the project, protection of the historical value of the property, and the effect of the new proposed business on the already existing businesses in the Town. He said 75 or 80 citizens attended the public hearing before the Council and in the majority were opposed to the Robson rezoning. A strong proponent of development in the Town, Mr. English was surprised at the negative outcome of the Council's vote on the rezoning following the public hearing on the application. He felt the atmosphere at the meeting had a lot to do with the Council vote. In his view the atmosphere at the meeting was so intimidating that the vote should have been delayed to another time to allow passions to cool and to permit Council to direct itself calmly to the criteria of the MPS that it ought to consider while dealing with a rezoning application. Mr. English "knew" as soon as the vote was taken that Council's decision "would be, should be appealed on the grounds that it went against..the Municipal Development Plan."

After this vote of Council, Mr. English attended Council and "admonished" Council for what had happened at the public hearing. He said the public hearing was dominated by its majority of Councillors.

Prior to this final meeting on the Robson rezoning, Mr. English visited with the Watts. He felt that the house on the subject property was over 150 years old but "that nobody famous (or infamous) had ever lived there". After discussions with a couple of merchants in the Town, Mr. English concluded that the proposals would have no negative impact on their businesses.

Cross-examined by Mr. Wilson, Mr. English admitted that he was extremely pro-development for the Town. He believes that the Town has "stagnated" and, indeed, gone "downhill" and needs a boost from new development. Mr. English agreed that the West River Road was the major traffic artery in and out of Town. Mr. English did not believe that the location of the proposed business in the area to be rezoned would conflict with the express intent of the MPS to encourage the development of new businesses in the Downtown Core Area.

Mr. English felt the addition of the proposed commercial use on the subject land would mix in nicely with the existing neighbourhood which is just as much "commercial as residential now". He further is of the firm opinion that "you can't put Highway Commercial downtown".

In response to questions from the Board, Mr. English said he visualized the Development Agreement "zone" on each side of West River Road to encompass the properties fronting on each side of the West River Road. Mr. English said the meeting attended by 70 or 80 people was the advertised public meeting held by Council. He said that all the PAC meetings were open to the public and advertised but very few appeared in objection at the PAC meetings held to consider the Robson rezoning. In his opinion the vote of Council was against the policies of the MPS.

Robert Watt, West River Road, Pictou, one of the Appellants, was the next witness. Mr. Watt said he was one of the owners of the Watt property (held in the name of his wife, Mary) and had lived in the house on the property for over 18 years. Her father had left her the property.

Mr. Watt noted that in the time he had lived in the subject property the neighbourhood had become more commercial with the advent of several stores mentioned by some of the previous witnesses. No new residential houses were built in the neighbourhood in that time, according to Mr. Watt. He said there was now lots of traffic on the road and it had intensified over the years he had been living there, and especially since the Sobey's store was built further west on the West River Road.

Mr. Watt identified Exhibit R-22 as being a graphic representation of the boundaries of the Watt property which, he said, was "nearly two acres" in extent. On the east of the Watt property, Byron Clark resides. To the west Mrs. Sidney Morrison resides. On the south of the Watt property is the Highway. To the north, Mr. Watt said there was partly land of Mr. Clark and partly land of Mrs. Morrison.

Mr. Watt said he had a valid outstanding Agreement of Sale for the Watt property to Mr. Robson. He had never been approached in past years by others than Robson to sell his house to them. The listing of the property was not long outstanding before he received the Agreement of Sale with Mr. Robson. Regardless of the delay in sale to the present, Mr. Watt still intends to sell his property to Mr. Robson pursuant to this Agreement of Sale.

On cross-examination by Mr. Wilson, Mr. Watt estimated his house to be about 100 to 135 to 150 years old. He said it was a brick house, probably made with locally "quarried" brick.

Mr. Watt told the Board that neither the Town nor the province had put any Historic Designation on the Watt property.

James Daniel Chisholm, Pictou, the Town's Superintendent for Public Works (for the last 6 months), said he was responsible for the maintenance and operation of the Town's water supply system, sewage disposal system, snow removal, street repair and other like services of the Town.

Mr. Chisholm in the course of his duties made himself familiar with the Robson rezoning application. He said the Watt property could be serviced for its water supply by a 6" water line currently installed under the West River Road immediately in front of the property. He said there was "a manhole and sewage" within 85' of the east line of the Watt property which indicated to the witness that the Watt property could be serviced with the Town's public sewer system. He said the sewer line had also a 6" diameter which, with a capacity of 35 pounds-per-second, in his opinion, was capable of handling the sewage likely to be produced from the proposed development.

Mr. Chisholm told Mr. Wilson on cross-examination that he had taken over his present position on August 17, 1987 and that the public hearing on the Robson application had occurred on September 10, 1987. He had prepared no written report for Council or the PAC to present at the public hearing.

Under questions by the Board, Mr. Chisholm said the Town might have problems concerning an adequate water supply for firefighting purposes in the midst of an especially dry summer but that conventional water supply for the proposed development was generally adequate. In respect to the sewer system, Mr. Chisholm said the outfalls for its sewers discharged untreated sewage directly into Pictou Harbour. The Town is prohibited by environmental overseers from installing any new outfalls in the Harbour, otherwise there are no current environmental regulatory restraints on the Town concerning the disposal of sewage in Pictou Harbour.

Lawrence Leblanc, Pictou, building maintainence supervisor, Town Councillor (almost three years along on his second consecutive three year term), and PAC member represents Ward III which is in the east end of the Town (east of Wel~~l~~ington Street) as well as being its largest ward.

Councillor Leblanc participated in the preparation and passage of the 1986 MPS amendments. He is familiar with the Robson rezoning application.

Councillor Leblanc believed that the designation of Highway Commercial on the GFLUM of the Watt property as contained in the MPS gave Council no option but to grant the rezoning application of that property Mr. Robson had applied for.

Councillor Leblanc dealt with some of the objections to the rezoning as follows:

1. Some didn't want the restaurant placed on the Watt property. These people thought it should be placed in the Downtown Core. He felt taking away business would be taking away business "wherever you go" and he couldn't buy the argument of too much competition in the restaurant business in the Town.

2. The problems that might be created for the Clarke family next door to the proposed development by the development caused concern to some people. Councillor Leblanc accepted Mr. Robson's explanation, made at a PAC meeting, that he would compensate in part for any trouble this development may cause the Clarkes by skewing his building 60' to the west to maximize the lateral distance between the proposed new building and the Clarkes' existing buildings and thus give the Clarkes some residual privacy even after the rezoning.

3. Adequacy of the sewage system to support this proposal was called into account at one of the PAC meetings. Councillor Leblanc said this matter was checked out with the Superintendent of Public Works Department (as is usual in such matters) and the answer received supported the proposed development to the satisfaction of the councillor.

4. People were concerned about the increase in traffic to be generated in that area by the installation of the proposed

development. In the view of Councillor Leblanc, the Town had already anticipated that problem (and the problem of traffic on West River Road in general) by asking the province and the traffic authority to do a study and to widen West River Road to three lanes.

5. The Town had already "zoned" all the property from the Rotary to the Downtown Core, not already designated Highway Commercial, to a Highway Commercial of a type which could be brought to full development under a development agreement process.

In the view of Councillor Leblanc, these acts demonstrated that Council fully intended to develop that part of Town in a more intensive and commercial manner.

Councillor Leblanc said that to vote "No" on the rezoning application was to go against the MPS and, in his view, Council could not do that. He couldn't "see why" Council was suddenly changing its mind and retracting from its previous pro-commercial development stance in the area of the proposed development. He thinks Council "should have changed the damn By-law instead of breaking it."

Councillor Leblanc felt that "business attracts business" and the Town should be actively supporting the commencement and growth of new businesses. There is little opposition to the proposed development among his voters in Ward III, according to Councillor Leblanc.

Councillor Leblanc said he had no doubt that "public pressure" motivated Council to turn down the Robson rezoning.

On cross-examination by Mr. Wilson, Councillor Leblanc, although pressed heavily with quotations from the MPS, would not concede any different intention to the MPS than he had already explained.

Councillor Leblanc said he hoped that the intent of Council in passing the 1986 amendments to the MPS and the LUB was to make the entire area of both sides of West River Road from the "egg shaped area" to the Downtown Area subject to possible development under a development agreement process. He then corrected this statement and said it was his preference that a development agreement process be available for the whole of that area from the Rotary to the Downtown. Councillor Leblanc said that this was not yet the case, and that all of the property west of the Watt/Clarke boundary was designated Highway Commercial and could only be zoned C-3 by a rezoning and not by a development agreement.

Under cross-examination by Ms. MacDonald, Councillor Leblanc, when confronted with Policy B-6 page 6 of the MPS (which is an instruction to Council not to encourage business outside of the Central Business District), said this Policy is a matter of much concern and discussion at various PAC and Council meetings. He cited the development already outside the Downtown that has grown up in recent years. He said business located where it seems to itself best economically to locate. It is very difficult for a small town seeking appropriate development to arrest its decline to try to change the pressure of economic reality. He felt the commercial development along both sides of West River Road already was sufficiently commercial to make it "Downtown", at least in the context of such a small town as Pictou. Councillor Leblanc noted that the MPS was undergoing its periodic statutory review and Council was discussing the redefinition of the concept of the Downtown Core. Councillor Leblanc does not believe there is a suitable available downtown site on which the proposed development could be placed.

Daniel Robert Talbot is also a Town councillor and has, for all but 5 years, lived his life in the Town . He is in his first terms as councillor and has served on the PAC.

Councillor Talbot said he was generally in favour of new businesses locating in the Town. He noted however that the inhabitants of Ward I (which contains the Watt property) were overwhelmingly against the proposed rezoning and he followed the wishes of his voters. At previous meetings (e.g. meetings of the PAC) he had supported the rezoning by his vote. He doesn't believe that the decision of Council (for which he had voted) reflects the intention of the MPS.

There was no cross-examination of Councillor Talbot.

The Board asked him some questions. He said he was Forestry Supervisor at Scott Paper.

Michael Babinec, Pictou, is employed at Grauman-Ives Limited and has been an appointed member of PAC since May 1987. Grauman-Ives Limited is a business located on Water Street in the Downtown Core of the Town.

Mr. Babinec, as a member of the PAC, participated in and supported the Robson rezoning application. He felt the new business would benefit the Town as a whole and would not injure the existing downtown businesses.

Mr. Babinec, under cross-examination by Mr. Wilson, explained that granting the Robson rezoning application would have helped in the present effort to expand the Downtown Business Core. He felt it was "a good idea to have a restaurant in that area."

Mr. Babinec said the planning staff had recommended the rezoning. He feels he is on PAC to represent the "manufacturing side of the community". Mr. Babinec was the final witness called by the Appellants on their main case.

Ms. MacDonald, for the Town, called as her first witness Basil MacLeod, employed by the DPC, who resides at 26 A Kensington Avenue, Stellarton. Mr. Macleod is the provincial/municipal Development Officer for the six municipalities in Pictou County. He was qualified, with the consent of all counsel, to give opinion evidence as to the procedure to be followed under the Planning Act when applying for a rezoning in Pictou. Mr. Macleod delivered his opinion that the procedures followed by the Town in processing the Robson rezoning applicastion fully conformed with the provisions of the **Planning** Act. He handled the processing of that application as part of his duties as development officer.

On the issue of the content of the MPS, Mr. Macleod had this to say:

Q. You're familiar with the Municipal Planning Strategy for the Town of Pictou?
A. Yes, I am.

Q. Could you indicate, please, in your opinion, as to which plan is currently in force and the map that is attached to the... ?
A. Ah, with that I would ask access to my notes, in my file. I have a copy available for the Board. I only have one copy, though.

MR. LANGLEY: I would think for simplicity. You're talking...the question was "What was the current plan in effect with that map?" I believe evidence has already been submitted to the Board indicating which ones are currently in effect.
A. R-12. That is on the Board over there. In my opinion is the correct one being administered now.

Q.(MS. MacDONALD resumes) Have you Exhibit R-11 in your hands?
A. Yes, I do.

Q. Is that the updated Municipal Planning Strategy?
A. It is updated as indicated on this to November 18, 1987, or 1986, I'm sorry.

Q. Is that to your knowledge correct plan that is in effect?
A. Without goin' through all the sections I would say that it would be the closest, it would be the document that, any amendments would be there too.

Q. Thank you.

(MR . WILSON commences his cross-examination.)
Q. When this application came to the Commission for a Technical Report, which Land Use Planning Map was the Commission relying upon? Would it be R-11 or R-12?
A. I would say if it was that one it shouldn't have been. It should have been the one underneath, R-12. This particular one.

Q. You have put R-12 forward. Was it R-11 or R-12? Which one were you relying on when you prepared your opinion?
A. I did not prepare any opinion on this.

Q. Do you know which one the Commission which you, as a Development Officer, would have relied on when the opinion was prepared?
A. I would have seen...they should have been relying on R-12, that is the proper document.

q. Do you know which one they were using?
A. No.

Q. Are you aware that file came to the attention of the Town Clerk only yesterday morning?
A. No, I wasn't.
MR. LANGLEY: I believe it's R-11, Mr. Chairman. I think the evidence suggests R-11, not R-12 that came to the attention of the Town Clerk.

Q. At any rate, in your opinion as the Development Officer you don't know what which plan they used the staff used to prepare the report?
A. No.

Q. That's all.

THE BOARD: Mr. Langley?
MR LANGLEY: No questions, Mr. Chairman.

THE BOARD: I have a couple then. Ah, I can't, I'm sorry, Mr. Macleod, I can't... Were you here the rest of the hearing? Maybe you'll remember what was said? I thought somebody said that nobody got a report from the Development Officer on this scheme? Do you know, ah, who said that and if they said...they said it at this hearing. It doesn't really matter. Would you be the Development Officer who would be preparing that ...?
A. If I was requested, I would have prepared a report. I discussed it with the planner, this particular case with the planner. I verbally discussed it, a number of cases with him.

Q. Before the decision , or after.
A. Pardon?

Q. Before the decision, or after?
A. Both.

THE BOARD: Anything arising out of that...Mr. Wilson?
MR. WILSON: Under the implementation provisions of the Strategy at the time for Pictou at page 70 of paragraph 4-8 "In considering amendments to the Zoning By-law it shall be the intention of Council to request a report from the Development Officer". You are the Development Officer?
A. Yes.

Q. Yeah. As a matter of course, does the application, ah, cross your desk?
A. Not initially. The procedure is that the request will go to Council. Council will then, as they have in resolution, will turn that over to the Planning Advisory Committee as you will find in that same document for consideration and appropriateness before the By-law can be amended, whether it is in line with the policies set down under the Plan. And then they, in turn consult with the planning department up until that first stage. Then it goes through that process. The meetings and meetings they are required to have. And then that, from that a report is given to Council as to whether they can proceed. That's when I become involved in the process.

Mr. Macleod gave only verbal reports on the Robson rezoning application and no reports to Council.

At one time, the practice in Pictou was to have the Development Officer make written reports on all rezoning applications, according to Mr. Macleod, but since the changes in the **Planning Act** that practice has been discontinued since those changes "give weight to the planning end of it."

David Steele was then recalled, this time as witness for the Town. He said the PAC was composed of the Mayor and six councillors and five outside members appointed by Council.

Mr. Steele said in excess of eighty people attended the public hearing held by Council on the Robson rezoning application held on September 10, 1987 in the same Council chamber in which the present appeal was conducted. When the public hearing ended, Council adjourned into a Council Meeting at which the zoning decision herein was made. There are two Councillors per ward, the Mayor is elected at large and, by custom, votes at Council only in the case of a tie.

Mayor Ernest A. Jordan testified next for the Town. He is retired postmaster by occupation, a member of PAC and, of course, Council as well.

Mayor Jordan does not usually vote at Council in his capacity of Mayor unless there is a tie. He does vote as a regular habit at meetings of the PAC.

Mayor Jordan said he attended an August 16, 1987 (a Sunday meeting) of Council which dealt with the Robson application to rezone. The Council voted in favour of the rezoning at that meeting. At this occasion Mayor Jordan voted to break the tie, reject the recommendation of the PAC that the rezoning not be granted, and send the rezoning application along for a public hearing by Council.

Mayor Jordan's vote was not required at the September 10, 1987 Council meeting (convened immediately subsequent to the public hearing) as Council arrived at its majority without his vote and rejected the rezoning application.

On cross-examination, Mayor Jordan said he was in favour of the rezoning application of the Robsons and he had, on every opportunity given him to vote during the Town's processing of the Robson rezoning application, voted to support the rezoning. Mayor Jordan said he was surprised when Council rejected the Robson rezoning application given what had transpired at previous meetings concerning the same application.

In response to Board questions, Mayor Jordan conceded that Sunday Pictou Town Council meetings were "unusual." There had never been a previous or subsequent Sunday Council meeting.

Teresa Gallant, accounting clerk for Hawker-Siddley, eight year resident of Pictou, Town Councillor (in the third year of her first term as councillor) Ward II, testified next for the Town. Councillor Gallant said the Watt property was not located in her ward but the business sector (Downtown Core) was.

Councillor Gallant said she had opposed the Robson rezoning application from "the very beginning."

In voting against the Robson rezoning application throughout its progress through the Town's planning process, Councillor Gallant said she had regard for the following factors:

1. Robson struck her as evasive when she asked him questions concerning his proposal at the various meetings held to consider the same.

2. A drawing in the third page of tab 1 of Exhibit R-21 indicated many Sobeys' enterprises located near the subject property. Councillor Gallant was concerned that the Robson application was merely a ploy to obtain, for Sobeys, an additional Sobeys' enterprise in the area which Councillor Gallant implied was, to her, highly undesirable. She withdrew this concern after making direct inquiries at the Sobeys organization which gave her information that satisfied her that the Robson rezoning application was unconnected with the Sobeys organization.

3. The location of the Robson proposal was undesirable because it would tend to disturb the Senior Citizen homeowners in the area in the quiet enjoyment of their properties.

4. Traffic flow, already high in the area, would be exacerbated by the proposed development.

5. Traffic increase would impact on the safety of children living in the area and going to and from school.

6. Business people were not in favour of the proposal as it constituted a threat to Downtown located businesses as well as a detriment to the expansion of business in the Downtown Core.

7. Mrs. Morrison, next door neighbour to the Watt property, also opposed the rezoning proposal.

Councillor Gallant said she was familiar with the MPS. She referred to Policy B-6 of the MPS which she considered to be a prohibition against future development in Town outside the Central Business District. Councillor Gallant said all new businesses should be located in the Downtown Core. She felt that by doing this historic properties in the Town would be protected, and the scenic entrance to the Town would be better preserved intact.

Councillor Gallant felt there was land available and suitable in the Downtown Core to accommodate the Robson proposal. Parking is ample and available.

Councillor Gallant said the Watt property and the Clarke property should have been both dedicated as historic properties. The brick that is in the homes on these properties came, she said, from a "quarry" on the back of the Clarke property.

Although she had attended the public hearing on the Robson rezoning application and heard the presentations made there by members of the public against the rezoning, Councillor Gallant said she did not take any of these publicly stated views into consideration when she subsequently voted against the rezoning.

On cross-examination by Mr. Wilson, Councillor Gallant said that the opposition expressed at the public hearing by members of the public was in line with her own thinking, rather than the other way around.

Councillor Gallant believed that the Robson proposal could only be processed by the Town under a development agreement process and that the option of rezoning was not open to the Town.

Kate Kennedy, a resident of Pictou for 17 years, is the Assistant Manager of New Glasgow's Tip Top store, and a Town Councillor nearing the end of her first three year term as such councillor representing Ward I of the Town which ward contains the Watt property.

Councillor Kennedy attended all meetings of both PAC and Council which dealt with the Robson rezoning application, voted at all the meetings where a vote was called for, and, on every occasion voted against the proposed rezoning.

Councillor Kennedy said she objected to the proposed development on the following grounds:

1. The development should be placed in the Downtown Core to follow the imperative of the MPS pushing downtown business development. She felt there was adequate land and underutilized parking facilities available to service the needs of Mr. Robson for his development.
2. She didn't trust the bona fides of Mr. Robson in making his proposal to the Town. His proposal was surrounded in "vagueness", according to Councillor Kennedy, and this

vagueness caused the councillor to view the proposal with suspicion.

(These were Councillor Kennedy's two main concerns. She had these other objections, as well.)

3. Pictou has a limited population and already four convenience stores. Councillor Kennedy believed the market for convenience stores in Pictou was "saturated" and the Town did not need the convenience store that appeared to be contained in the Robson rezoning proposal.

4. She recognized the groundswell of public opinion among her voters against the proposal.

5. She felt the "very nice entrance" to Pictou would be downgraded by the construction and use of the Watt property inherent in the Robson rezoning proposal. She felt some of the other businesses located along West River Road are "obscure" and do not denigrate from the vista one sees as one enters the Town. In the view of Councillor Kennedy, the panorama of "historical properties" located there would be adversely affected by the proposed development.

Under cross-examination by Mr. Langley, Councillor Kennedy said she was a member of the Heritage Committee of Council. She said the Heritage Committee had considered the Watt property during the same time frame that the proposed rezoning was being considered by the Town, but that no concrete action had been taken by the Committee to designate the Watt property as a heritage property.

Ralph Ferguson, Manager of The Canada Employment Center, resident of Pictou since 1974, Town Councillor since 1979, and Deputy-Mayor of the Town was the last witness called by the Town.

Deputy Mayor Ferguson had been a Councillor (Ward III) when the Town had adopted the original MDP in 1982 and when then the amendments had been made in 1986. He had views of what made up these documents which views are exemplified in the following excerpts from his evidence:

> "Q. What was your understanding, Councillor Ferguson, of the amendments that were made in respect to Policies B-6 and B-6-A in regard to development agreements?
> A. My understanding was that ah we had previously wanted to keep our business in the Downtown Core area and ah Council,and the PAC advising us, decided that we wanted to expand on that policy so that we would allow more business, more types of business, to establish from the Rotary on into Town, into the main area and that is what we set out to do.
>
> Q. And what were the conditions, as you understood it with respect to the developing a business outside of the Downtown Area?
> A. Well, as I understood it, the conditions were that ah the developer would have to come to the Town and negotiate a development agreement on any of the land that was already designated as C-3 on the zoning map.
>
> Q. I see. I would refer you to the maps. One is R-12 up above and R-11 down below. Have you seen those maps before?
> A. Yes, I am familiar with both of them. The R-12 is, I believe, the old map, the original map and the R-11 is one version of the map that is in use today. There is a third version and it seems to have a line across in the middle [THE BOARD: I'm sorry, I don't hear too well. I don't want to hear that.(Laughter) DEPUTY MAYOR FERGUSON: I can give you a copy. THE BOARD: Oh my!(sigh)]
>
> Q. Which map, if any, were you considering at the time you were dealing with the Robson application?
> A. The closest map is this one at the bottom, R-11.

Q. Now, I believe you have an exhibit there, R-18?
A. Yes.

Q. Yes. I refer you to the minutes of August 12, a meeting of the Planning Advisory Committee...
A. Right.

Q. Page 2 of those minutes indicates a vote that was taken on motion of Councillors Leblanc and Talbot, you've seen those minutes?
A. Yes.

...

At the PAC meeting held on August 12, Deputy Mayor Ferguson voted against the recommendation to Council to reject the application. He felt he had heard enough from planners and other staff that he had fully understood the proposal, he mistakenly thought that "the people" were in favour of the rezoning, and he was happy to have Council decide the issue one way or another. He thought the decision of Council would be the correct decision regardless of which way it went.

At the August 16 meeting of Council, Deputy Mayor Ferguson voted against the motion to refuse the Robson rezoning. He said he voted against that motion "to get it to the public."

At the "final" decision making meeting of Council held September 12, 1987, Deputy Mayor Ferguson moved the successful motion to deny the application of Robson to rezone the Watt property "on the basis of what I had heard from the public... the 80 or 118 depending on whose count you listen to....generally the people were against it for their own reasons, which varied."

On cross-examination, Deputy Mayor Ferguson said he was in favour of the proposed rezoning up until the time of the public hearing.

Deputy Mayor Ferguson thought the "egg shaped area" (designated Highway Commercial) was to be developed by development agreement, "everything from the Rotary in".

Mr. Wilson called David Clarke and qualified him, with the agreement of the other counsel, as an Interested Person under Section 24 (4) of the **Municipal Board Act.**

Donald Lloyd Mason, P.Eng., an employee of Planners Atlantic Limited of Halifax, was the next witness for the Interested Persons. He was qualified as an expert planner entitled to give opinion evidence as to planning matters as they affected the Town.

Mr. Mason had not participated in the planning that lead to the present application to rezone. He had been retained to peruse and pass an opinion on that rezoning application and whether or not the decision of Council rejecting that application to rezone fell reasonably within the intent of the MPS.

Mr. Mason said the proposed rezoning could not fall within the intent of the MPS for the following reasons:

1. The majority of the land area of the proposed rezoning fell without the area designated Highway Commercial on the

GFLUM (whichever you chose, Exhibit R-11 enclosure or Exhibit R-12).

2. It was not open to Council (or the Board) to sever the undesignated portion of the subject land from the rezoning and rezone the remaining highway frontage to C-3.

3. It was not possible to extend the so called "elastic" boundary of the Highway Commercial Designation on the GFLUM to include all of the subject property for the purposes of forwarding its rezoning to C-3.

4. The imperative in the MPS to support the growth of commercial development in the Downtown Core was not being forwarded by the rezoning applied for.

5. The proposed development did not attempt to preserve "the historical qualities of the Town" which, he said was another mandate of the MPS which had to be applied to the proposed rezoning.

Mr. Mason conceded that there was a great deal of "confusion" as to what was the proper MPS (especially in regard to which document was the proper GFLUM to be interpreted) and to what area along West River Road between the Rotary and the Downtown Core could be, without a supporting change in the MPS, put into Highway Commercial uses by rezoning and what area could be put to similar Highway Commercial uses by development agreement and whether those two areas were mutually exclusive. At page 29 of the transcript of his evidence, Mr. Mason had this to say:

A. I feel that I can add to what I said before...Council is subject to criticism no matter which way it would have or could have come down, and that it's subject to a legitimate appeal, and I think...until this matter was straightened up, you know, if I was a voting member of that Council, I would have voted the matter down until it was clear as to what options...clear options, I would have had.

Mr. Mason expressed the opinion that before Council could pass on a rezoning application it had a mandatory duty to first request and obtain a report on the proposed rezoning from the Town's Development Officer. At page 59 of the transcript of his evidence he said:

A. I would be prepared to appeal that, and I would be prepared to win that on that single function....[p60]

MR.WELDON:...it's still a valid appealable item?
A. That's right....

In his evidence, Mr. Mason also expressed the opinion that the MPS was the determining document in any rezoning application and the GFLUM is the most important map therein.

Mr. Mason held the opinion that the boundaries of the Highway Commercial Zone as appearing in the MPS were not laid out in the MPS with any directions therein as to interpretation. He then said it was necesssary to go to the LUB and use its precise definitions of the zonal boundaries therein expressed as definition of the Land Use Designations shown graphically on the GFLUM.

In an interchange between himself and the Board concerning the decision of Council and the intent of the

MPS, Mr. Mason had made the following rather revealing remarks commencing at the bottom of p63 of the transcript:

MR. WELDON: But you didn't say that it reasonably conforms with the decision...with the 'intent', did [p64] you?
MR. MASON: Well, starting from that end of the scale, and one can make the case that it does 'conform'.

MR. WELDON: But what's your opinion? Does it or doesn't it?
MR. MASON: In this case it can be said to 'conform with the intent' of the plan.

MR. WELDON: Of course, it 'can be said that' but what do you say?
MR. MASON: Yes, alright. I say first of all that no matter which way the decision came down, Council was in a no-win situation, and had an appealable situation in both cases. It was not against the intent of the Plan, not found to be 'against' it, and one is left with either a neutral position or one 'for'.

...

[p65]MR. WELDON: Now , is there a possibility that the proposal of the developer may also fall within the intent of the M.P.S. in this particular fact or circumstances?
MR. MASON: No, there is not. ...that would require a plan amendment as well as a rezoning.

Mr. Mason was Mr. Wilson's last witness.

Several people in the audience then came forward were sworn, and spoke on their own behalf.

Archibald Cameron, 63 Prince Street spoke first. Mr. Cameron retired to Pictou from the air force in 1965. He said he was heavi~~l~~ly interested in the Town's Heritage.

Mr. Cameron emphasized the historic importance to the Town of the brick used in the construction of the Watt house and the adjacent house of the Clarkes.

Mr. Cameron said the Watt property and the Clarke property, ornamentally treed and well landscaped give an excellent scenic touch to the entrance to Pictou which will be destroyed, in his opinion, by the construction of the proposed fast food outlet on the Watt property.

Mr. Cameron felt the proposed development would exacerbate bad traffic conditions on West River Road.

Bill Muncie, 116 High Street, Pictou then spoke. Mr. Muncie, a J.P. and former Prothonotary supported the maintenance of the scenic aspects of the properties mentioned by the previous witness (which he said had looked the same for the last 50 or 60 years) and he also expressed his concern about probable worsening of the traffic in the area which would likely be caused by the proposed development.

Gordon Young, 77 Patterson Street, Pictou, a young physician, said he was a descendant of the union of the first male and female Euorpeans born in Pictou County.

Dr. Young said he had attended as much of the Board hearing as he could and said he had received the impression that the Board was hearing from people who had direct interests to forward. He felt that many other people, with more distance from the proposal, had useful views which were not being put forward so he thought he fit among that group and would put forward his views on the rezoning in order both to express his views and to express what he conceived to be the views of others of a like mind and position. He felt himself and these others would be gravely affected by the outcome of this appeal, yet, without his intervention, would not have their views put before the Board.

Dr. Young said he had spent nine years in post-high School education and became qualified to practice almost anywhere in the world, yet had chosen to return to practice in his native Pictou.

Dr. Young said in making such a choice he had had to analyze how the Town's attributes appealed to the values he would have to apply when selecting a suitable place to live and to work. He thought the prime values of the Town were its heritage, its buildings, and its location. He believes the Town is relatively unspoiled in comparison to other communities known to him. Dr. Young said the Town had little ribbon development, and little decay in its Downtown Core. He feels the Town's waterfront had not been spoiled in respect to its natural beauty.

Dr. Young believed that the Town has preserved many of its "magnificent streetscapes". He said it abounds in great old Downtown stone buildings. He said Prince Street still contains a parade of "great old mansions going up the hill" which adds to the Town's desirability as a place to live. He believes that the subject area of the West River Road is an area, unique in the Town, which, in its present streetscape, adds in a like manner to the quality of Town living because of its great beauty.

Dr. Young said people in a small town such as Pictou regard all of the Town's pleasant attributes as an effective extension of their own properties and consequently have a proprietory interest in the preservation of the amenities of the Town. He said the Town has spent much time and effort in the making of Parks and green areas. All Town inhabitants feel, said Dr. Young, they have a stake in the proper development of the Watt property.

Dr. Young said he, having heard much of the two day hearing, was not too impressed with "the legal arguments, the nit-picking" that he had heard during that time. He admitted that the hearing was designed to decide the legal issues involved: he felt, however, that an aesthetic issue also had to be properly decided at the same time.

Dr. Young emphatically expressed the opinion that the proposed development of the Watt property would "destroy" the property. He could not conceive of the view that any person would wish to destroy that property.

Dr. Young said that the public apathy of citizens to planning matters complained of by witnesses previous to him did not seem to apply in this case since many citizens had attended Council to make known their views concerning this particular development. He was of the view "that the citizens of the Town were overwhelmingly against this" development.

George Bedford testified next. He argued for the preservation of the entrance to the Town along the West River Road. He said the proposed development "wouldn't be Pictou." He felt commercialism should come second to the satisfaction of the existing residents.

Councillor Ferguson returned to the stand to speak, now, on his own behalf. He proposed to address the subject of tourism and also the statements given in previous evidence that "this place is saturated" with restaurants and convenience stores. Councillor Ferguson said wheelchair bound persons are, at present, inadequately served by the existing restaurants and convenience stores in the Town. The proposed development is designed to be wheelchair accessible. He believes that there are comparatively many disabled tourists and he does not see that Pictou is "a very hospitable Town for this group of individuals."

The old buildings in the Town (the heritage buildings) were not built, according to Councillor Ferguson, with disabled people in mind.

Councillor Ferguson felt that if he approached the present development with a development agreement approach he would be able to negotiate into the development agreement amenities for the disabled, both native and tourist.

On this appeal the Board must adhere to the powers set out for it under the Planning Act (as well as other statutes) and must consider the effect of all its provisions. It brings attention more particularly to the following portions thereof:

"51 (1A) A council...may subsequently amend a land-use by-law in accordance with policies contained in the planning strategy.

(2) A council shall not adopt or amend a land-use by-law except to carry out the intent of a municipal planning strategy.

63(1)...the refusal by a council to amend or revise the land-use by-law pursuant to subsection 1(A) of Section 51 may be appealed by
...
(b) the applicant;
...
(3) The Board shall determine whether the decision of the council reasonably carries out the intent of the municipal planning strategy.

(4) The Board may
   (a) confirm the decision of council;
   (b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law; or
   (c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board.
(5) The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy.
...
(7) Notwithstanding subsections (5) and (6), the Board may allow an appeal by an applicant if, in the opinion of the Board,
   (a) the applicant would suffer undue hardship; or
   (b) extraordinary or compelling circumstances are present."

Having completed a review of the testimony of the witnesses, the Board will detail some of the relevant portions of the documentary evidence tendered to the Board much of it contained in Exhibits R-15, R-19 and R-21.

Exhibit R-15 "MINUTES PERTAINING TO AMENDMENTS TO PICTOU MUNICIPAL PLANNING STRATEGY - 1986" contains the following statments:

PAC meeting of March 26, 1986 stated that the PAC should recommend to Council "that (1) the Planning Strategy be amended to designate both sides of the West River Road from High Street to the Rotary as Highway Commercial on the Future Land Use Map and (2) the lot of Sandy MacKay next to his motel be rezoned from Residential (R1) to Highway Commercial (C3). Motion carried unanimously."

PAC Meeting May 1, 1987:

"WEST RIVER ROAD
Chairman English stated that the first item for discussion was the proposal to designate both sides of West River Road, from High Street to the Rotary, as Highway Commercial in the Generalized Future Land Use Map. ...

Chairman English pointed out that if this proposal is approved then rezoning in the West River Road area will be able to be done more quickly as Plan amendments will no longer be necessary.

Mr. Brown presented a Technical Report... . He outlined 3 procedures by which rezonings to Highway Commercial could be allowed along the West River Road.

...Alternative C, which is the proposal being considered (designation of the area as C3 on the Future Land Use Map), gives the impression that Council wants the area to be developed as Commercial. He noted that the West River Road was not really adaptible to Highway Commercial without some expense to the town including the widening of the street. Mr. Brown stated that alternatives A and B would allow rezonings in the West River Road area without the change in designation on the Future Land Use Map. He noted these alternatives would allow Council more flexibility in deciding what would be allowed in the area.

...alternatives[sic] A would allow neighbourhood commercial and highway commercial uses by rezoning while alternative B would allow these uses by development agreement...[which] would allow the Town to negotiate issues that would be a concern to the residents in the area.

...it was moved that the Municipal Planning Strategy be amended as set out in alternative B to allow new highway commercial uses along the West River Road by development agreement...Motion carried unanimously.

TECHNICAL REPORT TO PAC April 16, 1986

"1.**BACKGROUND**
...planning staff...suggested an amendment to the...Development Plan...would be necessary to accommodate the [Sandy's Inn] 'rezoning' proposal. PAC recommended to Council that the strategy be amended to designate both sides of the West River Road from High Street to the Rotary as Highway Commercial on the Generalized Future Land Use Map, and that the Bylaw be amended by 'rezoning' the lot in question from R1 to C3 Zone.

Council agreed in principle ... and...sent the matter back to PAC for drafting of the Strategy and Bylaw amendments.

2.**PRESENT POLICIES**

... Policy B-6...
Planning staff...would suggest that the overriding emphasis on supporting commercial development in the Central Business District would preclude the 'rezoning' of lands along West River Road for highway commercial development...new highway commercial development was intended to locate in those areas designated as Highway Commercial on the Generalized Future Land Use Map and intended to be a 'rezoning' process when necessary.

Policy 26 is slightly 'fuzzy'...resulting from the combining the discussion of both 'highway commercial' and 'neighbourhood commercial' uses in the same sentence. ... an amendment in the Strategy would... clarify Council's intents with regards to highway commercial development and uses as well as allow for the 'rezoning' of lands along West River Road as requested.

Policy O-13 allows for an amendment to the Strategy...

3. **TECHNICAL ASSESSMENT**
...
...PAC has begun to search for ways to increase the commercial tax base...by:
a) continuing...encouragement for new commercial uses to locate in the Central Business District, and
b) beginning to encourage highway commercial development to locate in Pictou,...

PAC has...suggested...extending the Highway Commercial designation on the Generalized Future Land Use Map from the Rotary to the Central Business District along West River

Road...main arterial road connecting the Central Business District with the Trans-Canada Highway (#106) at the Rotary.
...

Planning Staff have two concerns with the proposed amendment. First...need to provide some protection to existing residential uses along West River Road from some of the impacts of new highway commercial development locating in that area. Second...capacity of the roadway...to allow efficent ingress and egress by traffic to potential sites for new highway commercial development.
...
... 'rezoning' procedure may not provide adequate protection to existing residential development. ... a development agreement...provides Council the opportunity to demand...certain terms and conditions to reduce the impact... .

...designating all of the lands fronting on West River Road... may be premature...roadway...not sufficient capacity to handle...traffic....

... three alternatives for PAC...

Alternative A-allowing neighbourhood commercial uses and highway commercial uses (along specified arterial roads) by 'rezoning'.

Alternative B-allowing neighbourhood commercial uses and expansion of existing highway commercial uses by rezoning; and allowing new highway commercial uses (along specified arterial roads) by development agreement.

Alternative C-allowing neighbourhood commercial in residential neighbourhood by rezoning; and allowing highway commercial uses in designated areas by rezoning as well as designating West River Road from the rotary to the Central Business District as Highway Commercial on the Generalized Future Land Use Map.

4.RECOMMENDATIONS
...
...designating all of West River Road...Alternative C, is premature....

Alternatives A and B both would allow new highway commercial development to locate along West River Road...without leaving a false impression for developers or creating unecessary fear on the part of owners of residential units... . Alternative B...offer[s] a better measure of protection to existing residential uses since development agreements can deal more effectively with negative impact issues than can a 'rezoning' procedure.

...

ALTERNATIVE C

...

[SEE SCHEDULE C TO THIS DECISION FOR PLAN IMPROPERLY INSERTED IN EXHIBIT R-11]"

Council minutes May 12, 1986:

"**P.A.C. - RECOMMENDATIONS**
A recommendation...to amend the Municipal Planning Strategy to allow new highway commercial uses along the West River Road by development agreement ...[to] go to as public hearing...carried unanimously. ...

A recommendation...traffic flow study on West River Road...carried unanimously."

Minutes of Public Hearing June 12, 1986:

"...
Mr. Brown reviewed the amendments...highway commercial uses along the West River Road by development agreement. ...
...No members of the public in attendance. ..."

Minutes of Special Council Meeting June 12, 1986

"...
PLANNING STRATEGY
...the amendments to the Municipal Planning Strategy recommended by the Plannng advisory Committee for the purpose of allowing highway...commercial uses along the West River Road by development agreements...approved ...unanimously. ...

NOTICE TOWN OF PICTOU of advertising the public hearing"

Exhibit R-18 contains the minutes of Council and PAC that pertain to the present Robson application. The Board will excerpt from Exhibit R-18 such tid-bits of its germane information as it deems fit:

Minutes of Council July 20, 1987:

"...

ERIC ROBSON-REZONING

...letter...from ...Robson requesting the rezoning of the ...Watt property on West River Road, from R-1 to ... C-3 for the purpose of construction and operation of a retail outlet on that location.
The proposed building would be approximately 4,000 sq. ft. and will be utilized primarily for a fast food take out-eat in restaurant...forwarded to PAC ...carried unanimously."

PAC Minutes July 29, 1987:

"...Ian Robson...explained...he was the developer...not his father Eric. ... he is...to build a one storey building ... primarily a fast food, eat-in take-out restaurant...not been established...the amount or type of convenience items to be sold. ... he hoped this was the first of... a chain of this type of restaurant know as Dandy's.

...nothing would be done to the Watt house and he showed...a drawing of his proposed building.

... concerned parties would have an opportunity to speak at the next meeting of the PAC. ..."

PAC Minutes August 12, 1987:

"...

ROBSON REZONING

...request...to rezone...Watt proerty on the West River Road from ...R-1 to...C3...for the purpose of constructing a fast food restaurant with a convenience store component.

...tecnical report...stated lot... in area...C3 on the Future Land Use Map and therefore may be rezoned. ... consideration might be given to rezoning only part of the lot to prevent the house from becoming a non-conforming use. ... some concern about providing sewer service to this lot.

... some problem with the policies concerning highway commercial development...advised changes should be considered to correct those problems.

Mr. English...stated that B6 allowed highway commercial use in a portion of the C3 Zone on the Future Land Use Map by rezoning... that B6A allowed some highway commercial use in the remainder of the C3 Zone[this and subsequent emphasis by THE BOARD] by development agreement.... the ...Watt property is situated in the portion of the C3 Zone that falls under policy B6.

Councillor Gallant...was against the development because the downtown area would loose[sic] business and because tourists who are in the area would now be stopping at this store instead of coming into town.

Mr. Naylor... noted that Mr. Robson has provided no definite plans for the business. ...

Councillor Ferguson suggested that a development agreement... between the Town and Mr. Robson. Mr. MacIntyre advised that a development agreement could be required only if the Municipal Development Plan was amended.

Mr. Robson stated that his development would consist of a fast food 60 seat restaurant with take-out service as well as a limited convenience store business. ...he was unaware of any restrictions to opening 24 hours a day and expected very little of a noise problem... . he would be agreeable to signing a development agreement if it was not too restrictive...[and]willing to rezone only a portion of the property. ...he would encourage the construction of a turning lane on the West River Road.
[A motion to recommend the rezoning to Council was defeated by a vote of 6-4]"

Staff Report to PAC August 12, 1987

...

THE ISSUE

The...Municipal Planning Strategy contains some vaguaries[sic] with respect to the policies(B-6 and B-6A) concerning highway commercial development.

Logic would indicate that it is both the intent of the Municipal Planning Strategy and Town Council to allow rezonings to C3 uses along West River Road between the Rotary and Downtown.. within the originally designated Highway Commercial Area (see original Generalized Future Land-Use Map - Highway Commercial Designation).

However, the pertinent section of Policy B-6 (amended in June,1986) states that "Highway Commercial uses shall be allowed to locate in those areas designated Highway Commercial on the Generalized Future Land Use Map by rezoning , if necessary (meaning the area originally designated on the old map.)[emphases here and subsequently by the AUTHOR OF THE ORIGINAL REPORT]

Policy B-6 goes on to say that, "Highway commercial uses shall be allowed to locate outside those designated areas

along porions of West River Road between the rotary on Highway no. 106 and the boundary of the Central Business District..."(referring to the portion of West River Road prior to its redesignation as Highway Commercial on the Generalized Future Land Use Map). And In[sic] addition, Policy B6 states, "provided that :
(a) the proposal to expand an existing highway commercial use on adjacent property, or a proposal for a new highway commercial development, is subject to a development agreement ....".
...

DRAFT AMENDMENTS
...the designation on the Generalized Future Land Use Map for Highway Commercial uses causes some concern to the policy's intended meaning. ...

Policy B-6 requires clarification...

...
The remaining text of Policy B-6, B-6A, B-7, and B-9 seem to adequately reflect Council's intent ...
...the underlying issue behind the suggested development agreement concept is protection of the existing residential neighbourhood. The exclusion of certain commercial activities such as lounges and fast food restaurants among other types of uses known for long hours of operation, high traffic generation, and rapid customer turnover for example can significantly limit the degree of impact on surrounding residential uses....[Scheldue A map attached to this report seems to excerpt part of the erroneous Highway Commercial Designation shown on the plan excerpted from Exhibit R-11] "

Minutes of Special Council Meeting August 16, 1987:

"...
Councillor Johnston expressed concern about holding a meeting on Sunday, He stated that it is not only unusual but that it might also be illegal....he is attending the meeting under protest.
ROBSON REZONING...
[THESE MINUTES FORM PART OF ANOTHER EXHIBIT AND HAVE PREVIOUSLY BEEN MINED BY THE BOARD]"

Minutes Public hearing September 10, 1987 "[these minutes have already been summarized elsewhere in this decision as well as the minutes of the immediately following Council meeting which rejected the rezoning]"

Exhibit R-19 is a technical report presented to Council which should have been included in Exhibit R-18 and which recommends the proposed rezoning.

This completes the Board's notes from its overview of the documents tendered to the Board.

The Board, while reading the entire MPS, in Schedule A to this decision has extracted those portions of the MPS which seem of some direct pertinence to the appeal at hand and to the arguments made by various persons during the course of the appeal.

Mr. Langley argued that the MPS governing this rezoning application consisted of Exhibit R-11 (minus its enclosed GFLUM) plus the GFLUM before the Board as Exhibit R-12. This MPS included textual (but no mapping changes) made in 1986. Mr. Langley did not phrase his argument on this point in this manner but that is how the Board interpreted it.

Mr. Langley then argued that those opposed to the rezoning "framed their entire case upon an attack of the Town of Pictou's Municipal Planning Strategy."

Mr. Langley argues that the Board should follow the interpretation of the planners of the DPC in preference to that of the "hired" Mr. Mason since the DPC planners had much more exposure to the drafting of the MPS and its subsequent application in Pictou conditions after its adoption and subsequent amendment. He argued that the opponents, having little merit in their position, were attempting to sow confusion in the mind of the Board

Mr. Langley argues [and since two recent appeal court decisions Laba v. The Town of Kentville(unreported) S.C.A. No. 01717 which followed The Town of Bedford v. the Armoyan Group Limited(unreported) S.C.A.01908 both followed by the Board in Florence Developments Limited v. The Municipality of the County of Halifax (unreported) NSMB-603-87-P must be taken as trite law] "The text of Pictou's Land Use By-Law and Municipal Planning Strategy must be read in their entirety and the intent of the Municipal Planning Strategy cannot be interpreted from an interpretation of a particular policy...in isolation." From this point he argues that the intent of the MPS since, at least, 1982 is that Policy B-6 contemplated C-3 rezoning of otherwise zoned land in the "egg shaped" Highway Commercial Designation located on West River Road and shown on the GFLUM (Exhibit R-12). This type of authorized use change contemplated 10 Highway Commercial Uses within which the Robson proposal could be accommodated. He further argued that the frontage of the Watt property fell within that designation and that the rest of the lot could be incorporated into the proposed rezoning. He then argued that the intent of the MPS contained in Policy B6-A came into effect only in 1986 and provided for the extension of the highway commercial designation on the GFLUM eastwardly to the downtown core area by way of development agreement. "The weight of evidence presented during two days of hearing clearly supports the conclusion that the Planning Advisory Committee and Town Council understood this to be the case before, during and after the presentation of the Robson application."

After these arguments, Mr. Langley concluded this phase of his argument by submitting that the Town had a valid discernable MPS applicable to this Robson rezoning. He then argued that, throughout, Mr. Robson was attempting to rezone in an area designated for the rezoning. He argued that Mr. Robson made full inquiry into the relevant municipal regulations and evinced full cooperation with all the planning people who would deal with his application to rezone. He argued that the Technical Report supported the Robson application. Mr. Langley noted that Town Council voted in favour of the rezoning in "private meetings and against the rezoning during public meetings when members opposed to the application from the public were present."

Mr. Langley argued that Council's decision to turn down the Robson rezoning application was made in response to public pressure and without any consideration of the MPS.

Mr. Langley argued that the failure of the Development Officer to give a report on the rezoning to Council (see Policy O-8) does not go to the merit of the appeal and, that in any event, there was consultation between the Development

Officer and members of the Planning Staff concerning this rezoning.

On the issue of whether rezoning can be extended outside the area designated Highway Commercial on the GFLUM when the front part of the lot to be rezoned lies within the designation and the rest of the lot lies outside the designation, Mr. Langley argues that the designation boundaries on the GFLUM are "generalized" as their name implies and are somewhat flexible and can permit an extension of the necessary designation (and consequent rezoning) to at least the rear line of the lot fronting on the street. He further cites Policy O-15 as allowing the extension of rezoning without a supporting change in the MPS to properties immediately adjacent to appropriately designated areas on the GFLUM.

Ms. MacDonald, on behalf of the Town, argued that the relevant MPS was contained in Exhibit R-19 and that the appropriate GFLUM forming a part of that MPS was R-12. She concedes that, at least on many occasions, up until the date of this hearing, the erroneous GFLUM contained in Exhibit R-11 had been used by councillors and others as the GFLUM which applied to the present rezoning application.

Ms. MacDonald then argued that the intent of the MPS was that the Central Business District was the main location for new commercial development with exceptions, however, for some highway commercial development along certain roads for businesses to serve the tourism market. Ms. MacDonald submitted that she did not agree with the interpretation put on Policies B-6 and B-6A "which may have been clear to Mr. English and Mr. Brown, these policies as written do not show a clear intent with respect to highway commercial development."

Ms. MacDonald submits as the most logical interpretation of the intent of Policy B-6 is that the area along West River Road within the highway commercial designated area on the GFLUM may be rezoned while the development of highway commercial uses along West River Road between the designated highway commercial area and the Central Business Area is subject to development agreement. Therefore, in her view, since Mr. Robson had not applied for a development agreement for the residue of his lot and since that residue could only obtain C-3 uses under a development agreement, the decision of Council could be said to be reasonably within the intent of the MPS.

Ms. MacDonald referred in her arguments to Policies O-6 and O-7. She says that if the Watt property were to be put legally into Highway Commercial Uses within the intent of the MPS the part of the lot situate wihin the "egg shaped'" designated area would have to be zoned C3 by a rezoning process and that portion outside of the designated area would have to be put to Highway Commercial uses through the development agreement process.

Ms. MacDonald argues that the MPS militates against "ribbon development". She says that commercial development outside the Central Business District must be directed to the tourism business and that Mr. Robson did not adduce sufficient evidence to prove that "his proposal is primarily intended to serve the tourism market" in which case his proposal may not fall within the MPS' exception to its imperative intent that new commercial development be located in the Downtown Core. She furthermore argued that there was land in the Downtown Core suitable to the Robson proposal.

Ms. MacDonald conceded that "It is possible that the proposal of Mr. Robson falls within the intent of " the MPS and also that it falls within the intent of the MPS but is subject to treatment by development agreement rather than by rezoning.

Even in those events, Ms. MacDonald argued that the decision of Council was also within the intent of the MPS since it was in compliance with the intent of the MPS to generally prohibit commercial development outside of the Central Business District. She argued Council's decision also fell wihin the intent of the MPS to preserve the "aesthetics" of the Town.

Mr. Wilson, as he then was, made argument on behalf of the Interested Persons. He notes that Exhibit R-12 represents the old plan plus one amendment on the western side of the Rotary which does not affect the issue before the Board. He submits that this is the proper GFLUM to form part of the MPS.

Mr. Wilson correctly states that the proper issue before the Board : "Does the decision of Council reasonably carry out the intent of the Municipal Planning Strategy?" Mr. Wilson would have the Board pass over the "issues or vaguaries[sic] which arise out of the wording of particular sections, particular[sic] 6A or 6B or the confusion over the Plan."

Mr. Wilson emphasizes the portions of the MPS which strive to enhance "small town atmosphere", preserve the present "aesthetic and historical" qualities of the Town, and strengthen and develop the commercial viability of the downtown core area. He repeats Ms. MacDonald's argument that the MPS only permits new commercial projects outside the Downtown Core when the new commercial projects are promoting the tourism industry. He sites Policies O-6 and O-7. Mr Wilson says there are, on the evidence, sufficient bases under these policies and themes to secure the decision of Council against this appeal. He makes the argument, as did Ms. MacDonald, that a substantial part of the Watt property as it lies without the "egg shaped" area designated Highway commercial on the GFLUM and Mr. Robson, to achieve his objectives, must apply for C-3 uses, not by rezoning application, but by an application to enter into a development agreement, at least for the portion of the land outside the "egg shaped" area.

Mr. Wilson carefully notes that the application before the Board indicates "a 4000 square foot eat-in/take-out restaurant and a very undefined retail component". Mr. Wilson submits that under Policy B6-A, restaurants are not a use to be developed by development agreement.

Mr. Wilson then argues that, even if the Board were to consider allowing rezoning despite his previous arguments, development agreement processes, under the 1986 amendments to the MPS, apply to all the land on both sides of the West River Road from the Rotary to High Street including the Watt property.

Mr. Wilson said PAC and Council both rejected the application to rezone. He said the planner who made the recommendation to rezone was a very junior planner and his recommendation was tenative and based on an inaccurate and incomplete data. His opinion, argues Mr. Wilson, was "poor".

Mr. Wilson said the Robson application is the first application following the 1986 amendments to the MPS and thus the results of the application have an extra impact on the future management of the planning law of the Town out of proportion to the importance of the application itself.

Mr. Wilson argues that the application itself does not fall within the intent of the MPS and thus the decision of Council refusing the application must, axiomatically, be within the intent of the MPS.

He cites Power v. the County of Cape Breton (1986) 5-B M.B.D.477 @ p490 as to the importance the Board should put to the input of the public in this rezoning matter. In the view of the Board, Power could be distinguished since there was no MPS involved and therefore the legal test to be applied was very different from that to be applied in the present appeal. In Power the test of the "best interests of the Municipality" had to be applied by the Board to the rezoning application under Section 63 (6) of the Planning Act: In this case the Board must apply "an intent" of MPS test to the rezoning application under Section 63 (3) and (5) of the Planning Act. This distinction aside, Mr. Wilson is somewhat correct in arguing that the Board should use Power as a guide to help it evalute the effect of public input on a planning appeal. As the Board reads Power, the planners, the responsible politicians, and the people in the community most directly affected (except for the frustrated applicant) were unanimously against the rezoning. In the face of such unanimity supporting Council's refusal decision, Power holds that the Board should be especially hesitant to reverse that type decision supported so unanimously. In the present appeal, there is no such unanimity. The Municipal planners here, for what it is worth, support the rezoning application, both before Council and before the Board. Some of the responsible political people support the refused rezoning. This seems to include the Mayor, at least one councillor, and the Chairman of the PAC. Most of the "citizens-at-large" who spoke to the Board opposed the rezoning, but there is some indication on the evidence that some opinion polling was done and the apparent results of that polling showed that not all people in Town were against rezoning. In this case there was not the unanimity to engender extreme caution in the Board that was found in Power. For that reason the Board, while testing this appeal in the light of Power, does not regard Power a determinant when evaluating the "refusal to rezone" decision of Council in this appeal.

Ms. MacDonald clearly raised the related issues of heritage and aesthetics as they applied to the present application. Since no "famous or infamous" person ever resided in the old building on the Watt property, any historical connotations of that property must relate to the building itself or the materials therein contained. The MPS encourages the Town to preserve its history embodied in its old buildings by invoking the municipal provisions of the **Heritage Property Act** S.N.S., 1980, Chapter 8. The evidence here is clear that the Town has not yet so chosen to make any such designation to protect either the history that may be locked up in this building or the aesthetics which may also be supported by this particular statute.

The **Heritage Property Act** provides a vehicle whereby the needs of the public to "expropriate" certain of a landowners ordinary rights to develop his property as he likes in order to preserve historical qualities of that property for the general good while allowing the owner due compensation for the "expropriation" of those ordinary rights. The general scheme of the act is a politically decided designation, a waiting period for negotiation and reflection followed by a withdrawal or a "freezing".

If the "freezing" occurs there must be adequate compensation for the landowner, if he so wishes. The municipality wishing to designate an heritage property must, after an extended but finite time, be prepared to either "expropriate and compensate" of forget the instrusion into the landowner's usual development rights. Pictou has not yet done this in relation to the Watt property. In the view of the Board in the matter of "historical buildings", at least, under the MPS of the Town, heritage designation of the Watt property as outlined above is the only way for Council to meet the demand to preserve the building, on its site, for the purposes of preserving its historical attributes.

Although "aesthetics" can probably also be protected under the provisions of the **Heritage Property Act**, the Board is not nearly so sure that the heritage property deignation route of protection of aesthetics under the MPS is the only route contemplated in the MPS. As most eloquently put by Dr. Young in his testimony, "aesthetics" applies to the whole regard had by the citizens to their Town, how they perceive their town and how they wish it to be. This type of judgement is much more subjective and undoubtedly differs from citizen to citizen. Such judgements, consciously arrived at and balancing off the conflicting desires of the people affected, seem to the Board to best able to be arrived at by persons skilled in and elected for the balancing of such conflicts. Given the indefinite results of this decision, the Board has no duty in this appeal (since it can determine the appeal on other grounds) to fully define the meaning of and effect of "aesthetics" embodied in the MPS as it applies to this rezoning refusal appeal and therefore declines to do so.

For the same reason, and also because the Town appears to be studying the resolution of the same issue in a review of its MPS, the Board will not deal with the arguments advanced by counsel asking the Board to resolve the tension created by the MPS in regard to new commercial development. That tension is raised by the question implicit in Council's ongoing interpretation of the MPS:"Should new development be all Downtown, or should some be permitted along the West River Road?"

In short, after the above review and argument, the Board conceives as its first task the identification of what MPS, if any, applies to the Robson rezoning of the Watt property. Once the Board determines that there is, indeed, a valid MPS for the Town, it then determines what makes up that MPS and then, and then only, it gets down to its prime duty of perusing that MPS to determine the intent of that MPS and to measure the decision of Council against the intent of the MPS.

On the evidence, there was clearly some confusion even at the Board level what documents actually made up the applicable MPS. One witness or another supported one or more of the following incompatible alternatives:

1. Exhibit R-11, certified by the Clerk under the seal of his office obstensively pursuant to Section 12 of the Nova Scotia Evidence Act R.S.N.S., 1967, Chapter 94. The evidence disclosed that the GFLUM contained in this exhibit was materially erroneous in two of its depictions of the Highway Commercial Designations shown thereon.

2. Other witnesses, who should also have known the correct answer, said Exhibit R-12 was the correct (Pre-1986) GFLUM forming a very important part of the applicable MPS.

3. The experienced Chairman of the PAC, Mr. English, said R-12 was incorrect in that it depicted a Highway Commercial Designation area to the west of the Rotary which had never had the necessary approvals of Council and the Minister.

After all possible deliberation the Board has come to the conclusion that the Town has an valid MPS and it physically consists of the docments set out in the argument of Mr. Langley and modified by the argument of Mr. Wilson. This MPS may be described as follows: the MPS governing this rezoning application consisted of R-11 (minus its enclosed GFLUM) plus the GFLUM before the Board as R-12 minus one amendment showing another highway commercial designation on the western side of the Rotary which does not affect the issue before the Board. This MPS included textual changes (but no mapping changes) made in 1986. The Board holds that the MPS it must scrutinize for its intent is as described in this paragraph.

The main issue to determine is, after this exhaustive review, rather easy to determine. That main issue, as stated by Mr. Wilson, is: "Does the decision of Council reasonably fit within the intent of the MPS?" The clear and simple answer is that, on the evidence, it does not and it cannot. The Board would even say further that if the decision of Council had been to rezone (the opposite decision to the decision being appealed) the finding of the Board, given the same evidence before it, would have been the same. Mr. Mason probably said it most succinctly when he testified:

"A. I feel that I can add to what I said before...Council is subject to criticism no matter which way it would have or could have come down, and that it's subject to a legitimate appeal, and I think...until this matter was straightened up, you know, if I was a voting member of that Council, I would have voted the matter down until it was clear as to what options...clear options, I would have had."

During its processing of a rezoning application and before arriving at a decision, Council had a positive duty under the MPS to request from the Development Officer his report on the proposed rezoning. Council did not make any such request and, in fact, it was not proven that any report of the Development Officer was made or, if made, reached Council. Allegations were made that the planner had the benefit of the Development Officer's advice on the subject rezoning, gratuitously sought and likewise offered. This is no substitute for the formal seeking (and impliedly receiving) by Council of a Development Officer's report on each rezoning before it. Policy O-8 (a) of the MPS should have been followed in this rezoning appeal. This duty of Council cannot be delegated or relegated to casual or non-existent informal communications between planners and development officers. See Benedict v. Truro (1985) 4-B M.B.D. 291.

Council and PAC both acted having received advice on what constituted the applicable MPS which was erroneous in particulars extremely relevant to the rezoning application before Council. Council could not possibly have acted within the intent of the MPS because of the "poor" advice (in the words of Mr. Wilson) that it had received from the planner. All parties who testified said their decision had been made in the context of staff produced GFLUM which the Board holds was the wrong GFLUM. Mr. Mason, the MPS itself, and all who testified recognize the primacy of the GFLUM in the scheme of the MPS. The Board agrees with that primacy and with the patent and important materiality of the land use designations depicted on the GFLUM to the issues raised in this particular application to rezone.

The Chairman of the PAC vehemently advocated his position as being "pro-development" so the Board is free to infer, and it does infer, that any special expertise in planning matters that Mr. English would have acquired by virtue of his position, was not used to direct Council's attention to the applicable MPS and correct GFLUM.

Ms. MacDonald advocated that the only sensible meaning for the MPS is that development agreements allowing highway commercial uses apply to the land on the West River Road from the "egg shaped" area east to High Street and that rezoning for highway commercial uses applies to the land in the "egg shaped area" which runs West all the way along West River Road to the Rotary. If the Board had to decide this issue, it would feel that an equally valid rationalization of the confusion as to the meaning of the MPS would be "rezoning" and "development agreement" as alternate options in the "egg shaped" area, and "development agreement" only in the area to the east of the "egg shaped" area along the West River Road.

The Board notes that the planners got themselves confused with the wrong GFLUM in their report attempting to explain the "vaguaries" in the directly relevant policies bearing upon this rezoning application. Since it is not necessary to the result of this decision, the Board will not spell the errors out more fully. The Board does agree, however, with their general theme that it might be useful for Council to decide by way of MPS amendments just how, and to what extent if any, it wishes to alter the development/small town heritage tensions that are so clearly being exposed in Pictou.

The Board reads the MPS and looks to the LUB for assistance in resolving whether or not the entire Watt property may be rezoned or only the front portion that falls clearly within the area designated Highway Commercial on the GFLUM. The Board will not determine how far the "elastic" GFLUM land designation boundary for Highway Commercial may be extended but, if it has to resolve that issue for the purpose of determining this appeal, it holds that the "elastic" designation boundary for Highway Commercial of the GFLUM will extend at least to the rear line of the Watt Property. Those witnesses that stated this position make sense to the Board as advocating a practical resolution of any ambiguity. The Board used this type of approach to deal with generalized boundaries in **Andrews v. Municipality of East Hants** (second decision dated June 22, 1987; unreported;

now under appeal; leave granted appeal not heard) NSMB-586-87-P

All councillors who testified and voted against the rezoning frankly admitted that they followed the wishes of the crowd of people who packed Council Chambers for the public hearing on the Robson rezoning and the Council Meeting which immediately followed that public hearing. As pointed out in numerous previous decisions of this Board, undue response by Council decision makers to exaggerated public pressure of that nature can often be an objective indication to the Board, by which the Board may be helped to determine that Council's decision did not reasonably fall within the intent of the MPS. Council's decision must follow the intent of the MPS and not merely the possibly uninformed views of numerous neighbours hostile to the proposal. Council, at public hearing, must hear what the public has to say. After hearing the public, Council must then interpret what it has heard in the context of the MPS.

The Board has determined that pursuant to Section 63 (3) of the **Planning Act** the decision of Council does not reasonably carry out the intent of the MPS. In this case, the Board finds no restriction under Section 63 (5) of the **Planning Act** preventing it from allowing the appeal, or preventing the Board from interfering with the decision of Council.

The Board finds there is therefore no application of Section 63 (7) of the Planning Act possible in this appeal

The Board is also of the view that to give the Appellant the result he desires it must have before it sufficient evidence to allow it to order Council to rezone in a manner "prescibed by the Board". This option is the only positive option to the Board (Section 63 (4) (c) of the Planning Act) which would allow the Board to give the Appellant what he seeks.

In exercising its powers under this Section 63 (4) (c), the Board must realize that it is being asked to rezone a portion of a Municipality or Town where the elected Council has reviewed to some greater or lesser extent the proposed rezoning (in the light of Council's, one would think, superior local knowledge) and has already refused the application. The Board must necessarily approach such a situation with some sense of its own limitations (while having full regard for its undoubted power) and proceed with some caution when imposing a rezoning over the express public wishes of Council publicly arrived at. In order to fulfill this burden, the Board must have sufficient evidence placed before it to prove to a balance of probabilities what the applicant proposes and that what he proposes is before the Board in sufficient detail so that the Board can determine his rezoning is within the intent of the MPS as well. The Board may only order Council to rezone within the intent of the MPS.

The Board has before it insufficient evidence to satisfy itself that the proposal of the Appellant is within the intent of the MPS. The Board has no plans of the proposed development before it. It has differing evidence before it as to just what is proposed. Mr. Robson was accused by certain of the Town Councillors or producing insufficient information to satisfy them, at their level of decision making, as to the content of his proposal, and the Board is still not satisfied that the Applicant/Appellant has met the burden of proving sufficient details of his proposal to move the Board to order Council to enact the rezoning he seeks. Because of this evidentiary lack, the Board feels itself unable to grant relief to the Appellant under Section 63 (4) (c) of the **Planning Act**.

What options does the Board then have?

Two somewhat analogous situations have previously arisen which the Board has decided. Both concerned the Town of Amherst.

The first of the decisions was Arenburg v. Town of Amherst (1985) 4-B M.B.D. 429. Arenburg dealt with the citizen appeal of a development agreement which had been "passed" by Council prior to the approval of the MPS by the Minister. Before the appeal had been resolved, the Minister had approved the MPS. In that case the Board came to the conclusion that the development agreement could not be reasonably consistent with the intent of the MPS since the MPS did not exist in law and therefore could have no intent.

At p454 of that decision the Board had this to say:

> " The Board, of course, as an inferior tribunal, has no power to police any Council with prerogative remedies. It does, however, have power to review, under its sole jurisdiction [p455] (see Section 32(1) of the Municipal Board Act), the relationship between Development Agreements and Municipal Planning Strategies as provided for in the Planning Act...
> ...the Board must interfere with the decision of Council since that decision cannot reasonably be said to be consistent with the intent of the Municipal Planning Strategy.
> The Board then must review its powers on this appeal. Under Section 71, the Board has only limited powers when it decides an appeal under this Section. ..."

Under Arenburg the Board saw it had a statutory option to refer the matter back to Council for further consideration. That was done and the decision was not appealed.

Donald Sauveur et al v. the Town of Amherst and the Y.M.C.A. (unreported) NSMB-531-86-P was an appeal by an aggrieved person from a rezoning granted to the Y.M.C.A. To encompass the novel rezoning required, Council passed an amendment to the LUB creating the novel zone accompanied by another amendment to the LUB rezoning the property in question to the new "novel" zone, both at the same Council meeting. Neither amendment to the LUB had Ministerial approval, of course, and the LUB amendment which created the novel zone clearly required such approval under Section 60 (5) of the Planning Act .

An appeal was commenced related to the second amendment to the LUB before such Ministerial approval was forthcoming, but the Ministerial approval of he first LUB amendment occurred before the Board handed down its decision on the appeal of the appeal of the second LUB amendment. In this appeal of the second LUB amendment, since it was a rezoning application decision on appeal (although not an appeal of a decision of refusal to rezone as is the present appeal), the Board said it was left, for its power, to the alternative powers contained in Section 63 (4) (a) (b) and (c) of the Planning Act as (it might be argued) is the Board here. There was no appeal in Sauveur taken against the first LUB amendment setting up the novel zone but only an appeal against the rezoning to the novel zone of the specific property in question.

At p44 of the filed decision in Sauveur, the Board starts to come to grips with the matters which may shed some light on the problems the Board is experiencing in attempts to resolve certain issues of the present appeal:

> "...The Board has concluded that it is open to some doubt as whether the Council had lawful authority to rezone...If the by-law is not "into force" it is doubtful that it is "complete and effective."...[p25]
>
> ... Corporation of the Township of Oro v. Kneeshaw 9 M.P.L.R. 306...lends some judicial support to the Board's concern that the Council may have been premature...in attempting to rezone ...[p47]

> This opinion about the procedure to be followed creates a serious dilemma for the Board. On the one hand it is clearly of the opinion that the council was acting within the intent of the M.P.S. in establishing the...Zone and it was also acting wihin the intent of the M.PS. in intending to rezone the subject property....[p48] On the other hand the Board has some doubts as to whether the Council properly suceeded in rezoning...[the subject] property to the Zone it created.
>
> The Board is of the further opinion that it has no alternative based on its options available under Section 63 (4) of the Planning Act but to confirm the decision of Council... . The Board makes this assumption on the basis that it has no power or authority to declare that a municipal by-law is legally invalid or defective in some respect and must therefore assume the validity of the by-law in question.[emphasis by the present Board]."

Arenburg differs from Sauveur as well not only for the obvious difference of "development agreement" v. "rezoning application" but also, in Arenburg there was a specific remedial power the Board could find in the Planning Act which the Board could not seem to find in Sauveur.

Neither case is totally on point with the facts of the present appeal, but all three cases do contain an element of what Dr. Young might have called "legalistic confusion."

Sauveur's apparently definitive finding that, since the Board had no alternative remedy to offer the Appellant, it must confirm the decision of Council under Section 63 (4) of the Planning Act, seems to be the logical conclusion from a basis of reasoning used in that decision and therefore that decision and its facts, as they differ from the facts and conclusions of the present appeal and its decision, deserve further comment from the Board.

It could be said that the legal conclusion cited above for Sauveur could be used to decide this appeal. Chairman Blois who presided in that case based his reasoning on his findings that both amendments to the LUB were within the intent of the MPS.

In relation to the first and unappealed amendment, the present Board with the greatest of deference points out that the issue of that particular By-law and its relation to the intent of the MPS was not before him on the Sauveur appeal and that his findings on that score are, at best, dicta, and are, at worst, a wrong premise on which to found his subsequent reasoned conclusion.

In relation to the second and appealed LUB amendment before the Board in Sauveur, Chairman Blois also concluded that the LUB amendment before him was also within the intent of the MPS and he used this finding as a basis for his further reasoning leading towards the conclusion alluded to above. With deference, the Board feels Chairman Blois strayed into error when he appeared to test the LUB amendment against the MPS without first locking both into a real and specific time frame. He appeared to view the contrast of LUB and intent of MPS as an event divorced from any concept of time which related to the realities as they existed in Sauveur. He should have scrutinized the LUB amendment having regard to its environment in the time frame existing when it was passed by Council. At that time the supporting LUB amendment was not in force and therefore could not support the amendment complained of. For Council then to act under the amendment and pass another amendment supported by it was clearly contrary to the Planning Act. A LUB amendment passed in such circumstances must fit within its MPS which in turn must conform to the Planning Act. If a provision of a LUB amendment violates the Planning Act, it seems to this Board that that LUB amendment just cannot fit within the intent of the MPS.

Chairman Blois was clearly in great doubt about his conclusion. This Board sees great merit in that doubt although it concedes that the lay Appellant in Sauveur did not seek to appeal that decision.

On the other hand, assuming Chairman Blois in Sauveur was correct in his findings, he definitely found that all the amendments to the LUB were within the intent of the MPS. In this appeal for the reasons stated above, the Board was enabled to make an equally definitive finding (based on very different facts) that the decision of Council herein not only was not, but could not have been, within the intent of the MPS.

Having said that, the Board will not follow the Board's decision in Sauveur if it is taken as authority for the proposition that on a refusal decision, as has occurred in this appeal, the Board in making its determination is totally restricted to, in this case, Section 63 (4) (a) or

(c) of the **Planning Act** and if it doesn't choose one it has only the alternative of choosing the other. Section 63 (4) opens with " The Board may.."

As noted above the Board found the decision of Council was not reasonably within the intent of the MPS. Given that finding, a conformation of Council's decision by the Board under Secton 63 (4) (a) of the **Planning Act** would be allowing Council to act in disregard of its MPS. This power to supersede the other requirements of the Planning Act enjoining Council to act in planning matters within the intent of its MPS would have to be much more clearly spelled out before the Board could allow such deviations from the intent of the MPS.

The Board, as stated in Arenburg , needs some statutory power in order to act. If such authority cannot be found in this situation under the permissive Section 63 of the **Planning Act** noted above, the Board is forced to come to some resolution of all matters properly before it by virtue of Section 29 of the **Municipal Board Act** which reads [with the Board's emphasis] as follows:

"29 In any matter before it, the Board shall grant an order, either as specified in the application or notice of appeal or as the Board decides, and may by order dismiss the application or appeal."

It bears repeating that the Board has no power to give a declaratory remedy, since declarations can only be issued by courts.

Since the Board on its view of the evidence cannot give any of the remedies listed for it in Section 63 of the **Planning Act**, it decides under Section 29 of the **Municipal Board Act**, for all the reasons stated above, to grant an order which allows the appeal only and does not order a rezoning.

To recapitulate the Board's findings in this appeal:

The Board found:

1. pursuant to Section 63(3) of the **Planning Act** the decision of Council did not reasonably carry out the intent of the Town's MPS;
2. on the facts of this appeal, Section 63(5) of the **Planning Act** did not prohibit the Board from allowing the appeal with the consequent finding, in this appeal, that Section 63(7) of the **Planning Act** had no bearing on the outcome of the appeal;
3. on the facts of this appeal, the Board is unable to grant the Appellants the relief they sought under the provisions of Section 63(4)(c) of the **Planning Act**;
4. the Board must resolve the appeal before it pursuant to Section 29 of the **Municipal Board Act**.

Even if s.s. 7(a) or (b) of Section 63 of the **Planning Act** applied to this appeal, there has been no evidence tendered of undue hardship to the Appellants and there is no evidence of extraordinary or compelling circumstances, so the appeal cannot succeed because of s.s. 7(a) or (b) of Section 63 of the **Planning Act.**

An order will issue accordingly.

DATED AT HALIFAX, Nova Scotia this 28th day of July, 1988.

RICHARD L. WELDON

MEMBER

SCHEDULE A

EXCERPTS TAKEN FROM THE MUNICIPAL PLANNING STRTATEGY AND LAND USE BY-LAW OF PICTOU

I

MUNICIPAL PLANNING STRATEGY EXCERPTS

[This Municipal Planning Strategy on its face purports to be be originally passed by Council November 10, 1981, subjected to certain Ministerial amendments under Section 4 of the Municipal Affairs Act CHAPTER 193 R.S.N.S 1967, as amended on March 31, 1982, confirmed by Council on January 11, 1982 and subsequently amended November 18, 1986. Ministerial approval is alleged to have occurred for each sucessive stage of this development. The MPS was brought before the Board in this appeal in various guises and formats including Exhibits R-11 and R-19. Unles otherwise stated these excerpts have been taken from Exhibit R-19.]

[6th p unumbered]

...

Map No. 5 Generalized Future Land Use

...

[p1] **INTRODUCTION**

...

The Municipal Development Plan, from herein, known as the "Plan" pertains to the entire area within the official boundaries of the Town of Pictou... .

... The Plan is intended to encourage future land development in a proper and orderly manner. To this end, the Plan has identified certain objectives or goals followed by a list of policies which are directed toward their achievement. These policies will be implemented by the Town Council by various means which are outlined in the Section of Implementation (Section O of this Plan). ...

... Council may only adopt, amend or revise a [p2] zoning by-law "for the purpose of carrying out the intent of this...plan....

...The background study will form an appendix of the formal "plan".

Throughout the "plan", maps have been specifically referred to in the policy statements and are intended to be included in and form part of the legal...Plan. Most importantly, this includes the "Generalized Future Land Use Map" which is a graphic representation of the land use districts which are to be developed in accordance with the policies of this Plan....

...The results of this public participation is [sic] also found in the "background study".[p3]

Council ...has adopted certain general goals and objectives which are to be used in guiding Pictou's future...not listed in order of priority.

1. To guide development so as to enhance Pictou's small-town atmosphere.

2. To promote and guide the orderly development of the Town.

3. To encourage light industry and a diversified economic base.

4. To preseve the present aesthetic and historical qualities of the town.

5. To encourage a pattern of land use in which a variety of uses are compatibly located to satisfy the needs of present and future residents of Pictou.

6. To encourage development that is not financially detrimental to the town.

...

8. To stengthen and develop the downtown core area (centered on the existing downtown) so as to:
- improve parking
- promote pedestrian movement and shopping
- make the downtown more attractive.

...

10. To prevent the deterioration of both the natural and built up environment.

...

[p4]

12. To minimize environmental disruptions and pollution.

...

14. To encourage development within the town which provides employment opportunities to Pictou residents while preserving a high quality enviromnment in which to live and play.

15. To promote a variety of services to maximize the social benefits to Town residents while ensuring the commitments remain within the financial capabilities of the Town.[p5]

PLANNING CONTEXT

Location:

The Town...is located on the North shore of Pictou Harbour approximately 10 miles from the neighbouring towns of New Glasgow, Stellarton, Trenton and Westville.... approximately 110 miles northeast of Halifax and 105 miles from the Nova Scotia-New Brunswick border. ...

The town is made up of...1,798 acres of land...approximately 190 acres are undeveloped and are being used for agricultural purposes. The major concentration of developed land extends northward to an area just past Cottage Street. Within this land mass, 417 acres are used for urban type development. Much of the land in this urban area is serviced by municipal water and sewer.

Pictou...contains a good mixture of both old and new development.... [p6]

The Commercial and Industrial Core is situated near the waterfront in the vicinty of Front, Church and Water Streets.

...new development will occur in a more northward and westward direction with several new housing developments locating...

[p10]

HISTORY[1]

The history of Pictou dates back to the mid 1770's when the ship "Hector" arrived with Scottish settlers from Lock[sic] Broom in Scotland.... In 1836 this area was formulated as a county with Pictou becoming the shiretown.

On December 30, 1873 the Town became incorporated....

During the war years Pictou was an important port with shipbuilding, fishing and port facilities playing a vital role in economy of the town and neighbouring areas.[p11]

...

During the past twenty-five years the town has progressed very slowly and not until recently has it taken on a more vital role.

The Downtown core will soon be taking on a new face with the proposed [circa 1981] multi-million dollar revitalization. ...[p12]

Residential development...

The existing residential development in the Town consists primarily of the single family dwellings, which for the most part are located on large lots.

...

The residential development surrounds the commercial core on the waterfront and extends...westward to ...the rotary.

...

[p16]POLICY

...

A-4 It shall be the intention of Council not to make financial expenditures for extensions to municipal water and sewer lines which are considered premature by virtue of the availability of existing serviced lots.[p17]

A-5 ... In the case where a vacant lot exists within close proximity of the town water and sewer system, the town may, where economically feasible, provide water and sewer services to the appropriate lot if the lot abutts a town owned street and is within 200 ft. of the existing services. Refer to Policy D1.

A-6 ...five residential zones in the zoning by-law...

R-1- Residential 1

R-2 Residential 2 (Restricted)

R-3 Residential 3

R-4 Rural Residentiasl and Agricultural

R-5 Mobile Home Park ...[p21]

COMMERCIAL AND TOURISM DEVELOPMENT

1. Commercial Development[4]

The Central Business District has traditionally been located near the town's waterfront....along Water Street between the Church Street extension and Coleraine Street and along Front Street between Coleraine Street and Chapel Street...

The retail component also provides a specialized service in the core and a neighbourhood type service for various residental areas situated throughout town....many of the larger retail purchases are...in New Glasgow or the Truro area.

The Pictou Area Development Corporation...study...will revitalize a portion of the downtown core...revise the present traffic system...[provide] New parking lots through...reclaiming of the waterfront lots....[p22]

Council also recognizes that opportunities such as those at present are few and far between, therefore, it would be in the best interests of the Town and its residents to protect both the waterfront and the Business Core. Council should endeavour to enhance the historical aspect of the Town, especially in this Business Area....

...In arriving at its decision regarding special proposals, Council will: 1) seek the advice of its Planning Advisory Committee; 2) will provide notice to the Towns[sic] residents of the intended development; 3) amd may[p23] call for a meeting of the Town's citizens so that the details and the circumstances of the proposal(s) may be explained; and 4) the members of the general public being afforded an opportunity to express their views on the intended development....

...Council has also recognized the concept of special proposals should not be used in residential, neighbourhood or highway commercial areas of town, with one exception to this general rule.

Council is prepared to allow highway commercial development, outside those areas designated Highway Commercial on the Generalized Future Land Use Map, along specified arterial roads in certain circumstances. Existing highway commercial uses may be allowed to expand and new highway commercial uses may be allowed to locate along a specified arterial road subject to a development agreement. Such development agreements are intended to protect existing residential uses from some of the impacts of the commercial development.

The intention by Council to promote the Central Business District as the prome [sic, means prime] location for new commercial development remains. In [p23A] recognizing different locational needs by highway commercial uses, council intends to grant such development opportunities along specified roads or streets.

By permitting new highway commercial development in these special circumstances, Council intends to recognize the growing interests in commercial operations wishing to serve the tourism market and, subsequently, to facilitate a potential demand for new highway commercial development to locate in Pictou.

[p24]

2. Tourism

...

The Town...is presently not capitalizing on [tourism]... .[p25] ...Changes are required to attract more visitors... .

...

There are a number of historic buildings within and around the town...identified on the Pictou Historical Buildings Map No. 5 found in the Background Study. ... The Town Council should identify and protect properties within this category under the Heritage Property Act.[p26]

POLICY

B-1 It shall be the intention of Council that the Central Business District be located in the existing downtown commercial core and extend to the area as shown on the Generalized Future Land Use Map-Map No. 5.

...

B-6 It shall be the intention of Council in support of Policy B-1 to generally prohibit future commercial development from locating outside the Central Business District, as shown on the Generalized Future Land-Use Map-Map No.5. However, Council may also allow commercial uses to locate outside the Central Business District-without requiring an amendment to the Municipal Planning Strategy-as "home occupations" and as "neighbourhood commercial" uses or as "highway commercial" uses in certain circumstances specified below.[p26A]...

"[sic]Highway commercial uses shall be allowed to locate in those areas designated Highway Commercial on the Generalized Future Land Use Map by rezoning, if necessary. Highway commercial uses shall be allowed to locate outside those designated areas along portions of West River Road between the rotary on Highway #106 and the boundary of the Central Business District, provided that:

(a.)the proposal to expand an existing highway commercial use on adjacent property, or a proposal for a new highway commercial development, is subject to a development agreement in accordance with Policies B-6A, B-8 (as amended), B-9 (as amended), and B-9A.[p26B]

B-6A It shall be the intention of Council pursuant to Sections 66-73 of the Planning Act (1983) to consider and permit the development of highway commercial uses along an arterial road (as specified in Policy B-6) by means of a development agreement. It shall also be the intention of

Council that such development agreements be used primarily to protect the existing residential uses from some of the impacts of highway commercial development along a specified arterial road and to put forward the interests of the Town in allowing new opportunities for highway commercial development in Pictou. Council will be guided by the conditions set down in Policy B-8 to determine the appropriateness of a development agreement for the following highway commercial uses:

1. Retail Shop
2. Business or Professional Offices
3. Personal Service Establishments
4. Institutional Use
5. Automobile Service Station
6. Motel or Inn

B-7 It shall be the intention of Council to encourage the efforts of the Pictou Area Development Corporation and the Shiretown Development Corporation in their efforts to promote new development in the Central Business District.

B-8 It shall be the intention of Council under Section 55 of the Planning Act (1983) to consider and permit [p27]...the[sic]development, redevelopment or expansion of commercial, commercial residential, or institutional uses in the downtown core, that would not otherwise be permitted by the zoning by-law in the area designated General Commercial on the Generalized Future Land Use Map-Map No.5 ...

In determining the appropriateness of a Special Proposal and any procedures necessary to accomplish the development, and if the proposed development is deemed to be desirable, Council will be guided by the following conditions:

1. The impact of the proposed development on adjoining properties, with particular regard to the use and size of the structure that is proposed, buffering, landscaping, hours of operation for the proposed use and other similar features of the use and structure.[p28]
2 Municipal services with particular regard to demands on the water and sewer system, police and fire protection, and refuse collection.
3. Pedestrian and motor traffic circulation with particular regard to ingress and egress from the site, traffic flow and parking areas.
4. The financial capacity and the desirabilty of the Town to absorb any cost relating to the special development upon analysis and itemization of the costs which may be brought about by the proposed development.
5. Potential Impact upon the natural environment such[sic] erosion, contamination of water courses and all forms of pollution.
6. Comments arising from the public hearing on the proposed development.

B-9 It shall be the intention of Council that pursuant to Sectons 66-73 of the Planning Act (1983) a development agreement may contain such terms and conditions that it feels necessary to ensure that the development is consistent with the policies of the plan. The agreement may include, but be not limited to the following:

(i) the specific use and size of the structure, including the expansion of an existing structure.

(ii) provisions for adequate buffering to screen the development from adjacent uses.[p29]

(iii) the compatibility of the structure in terms of design and appearance with adjacent uses.

(iv) any matter which might be addressed in the zoning by-law... .

(v) the provision of services and utilities.

(vi) time limits of the initiation and completion of construction.

(vii) Any other matter which Council feels is necessary to ensure the general compatibility of the use and structure with adjacent residential areas...

B-9A ...planning staff, in concert with the Pictou Planning Advisory Committee, be responsible for...proposals for highway commercial development subject to development agreements... .[p30]

B-10 ...all commercial development in the Town to be connected to Municipal water and sewer services; with the exception of new highway commercial development locating on lands which are designated as Highway Commercial on the Generalized Future Land Use Map and which are more than 100 feet from existing sewer and water services.

...

B-12 It shall be the intention of Council to establish three commercial zones in the zoning by-law as follows:

C-1 General Commercial
C-2 Neighbourhood Commercial
C-3 Highway commercial [p31]

...

B-15 It shall be the intention of Council to designate various buildings in the Town that have historical significance in accordance with the Heritage Property Act.

...

[p32]

INDUSTRIAL DEVELOPMENT[5]

...

[p33]

C4 [sic] It shall be the intention of Council that the areas zoned for industrial use on the downtown waterfront shall not be expanded except by amendment to the Municipal Development Plan.[P35]

ENVIRONMENTAL HEALTH SERVICES[6]

...

...the Town experienced water quantity and quality problems. [p36] ...Water pressure within the system is very low. This water pressure problem could have very serious effects on the Towns[sic] fire fighting capability.

...

2. Sewer system

The Town is serviced by a central sewer system which carries both storm and sanitary effluent. The system now discharges[p37] untreated sewage into the harbour through thirteen (13) separate outfalls. In several areas of town a separate sewer system has been installed, however there have been problems...in that residents have connected roof and foundation drains to the sanitary sewer.

With development occuring in several new areas in Town, problems could be created with overloading of sewers in some of the older sections of the system. Upgrading or separation may therefore be required to accommodate flow from these new developments....[p38]

POLICY

D-1 It shall be the intention of Council that all new development...commercial...be required to connect to the Town's central water and sewer system.

...

D-3 It shall be the intention of Council to determine if the existing municipal water and sewer services will be adequate to handle new development. Council may require upgrading or separation of existing services to accommodate new developments.

...

[p47]

TRANSPORTATION, TRAFFIC AND PARKING[10]

...The street classification map-Map 7 classifies the function of each street in Town....

A study...indicated that the majority of traffic entered town by means of the rotary... .[p51]

POLICY

H-1 It shall be the intention of Council to adopt Map No. 7 as the official street classification map for the Town.

...

[p56]

ENVIRONMENTAL DEVELOPMENT[7]

...

[P57]

POLICY

...

[p 58]

J-7 It shall be the intention of Council to seek to reduce pollution by investigating[sic] possibility of treating all town sewage. Refer to Policy D6.

[p59]

GOVERNMENT SERVICES

...

The Town has the services of a building inspector and a development officer through joint participation in the Pictou County District[p60] Planning Commission.

[p61]

POLICY

...

K-3 It shall be the intention of Council to contribute and support the efforts of the Building Inspector and Development Officer from the Pictou County District Planning Commission. Refer to Policy O9.

[p62]

PROTECTIVE SERVICES

...

Fire Protection

...water pressure is inadequate to properly handle a major fire involving[a building in excess of four stories.] ...

...

IMPLEMENTATION

General

O-1 The Municipal Development Plan...is the prime policy document by which the future growth and development of the town shall be encouraged, controlled and co-ordinated. ...

O-2 ...it shall be the intention of Council to maintain a program of ongoing planning through its Planning Advisory Committee...[including] the drafting or revisions of Town by-laws which deal with planning matters... .

O-3 ...it shall be the intention of Council to circulate applications for amendment of the Zoning By-law...to appropriate provincial government agencies...for their information and comment or approval as may be required.

Generalized Future Land Use Map

The Generalized Future Land Use Map (Map 5) is the most important map in the Municipal Development Plan. It shows the future land use within the Town which has been recommended by the Plan...[and] includes the following designations:

...

[p67]

-Commercial (future commercial development);

...

Zoning By-law

O-5 The principal mechanism by which land use policies are implemented is the Zoning By-law. The Zoning By-law will set out zones, permitted uses, and development standards within the zones... .

O-6 It is not intended that all land shall be pre-zoned as indicated by the policies of this Plan or as indicated on the Generalized Future Land Use Map (Map 5). Rather, in order that Council may maintain a high degree of control on future development, initial zoning provisions will be comparatively restrictive. Development proposals which would not be permitted in the initial zoning will be processed as amendments to the zoning map...[and] such amendments will be granted only if they meet the guidelines found within this Municipal Development Plan.

categories of uses not to be prezoned include:

...

-Highway Commercial

...

[p68]

Criteria for Amendments to the Zoning By-law

O-7 In considering amendments to the Zoning By-law, in addition to all other criteria as set out in various policies of this Plan, council shall have regard to the following matters:

a) That the proposal is in conformity with the intents of this Plan and the requirements of all other Town By-laws and regulations;

b) That the proposal is not premature or inappropriate by reason of:

i) the financial capability of the Town to absorb any costs relating to the development.

ii) the adequacy of sewer and water services ...

...

iv) the adequacy of road networks...adjacent to ...the development;

...

vi) the potential for damage to or destruction of historic buildings and sites;

vii) creating a scattered or ribbon development pattern as opposed to compact development.

[p69]

c) That controls are placed on the proposed development so as to reduce confusion with any other adjacent or nearby land use by reason of :

i) type of use;

ii) emissions including air and water pollutants and noises

iii) height, bulk, and lot coverage of the proposed building;

iv) traffic generation, access to and egress from the site and parking;

v) open storage;

vi) signs;

vii) similar matters of planning concern; etc.

d) Suitability of the proposed site in terms of steepness of grades, soil and geological conditions, location of watercourses, marshes swamps,or bogs;

e) Provision for buffering, landscaping, screening and access control to reduce potential incompatibility with adjacent land uses and traffic arteries.

Amending the Zoning By-law

...

...Examples of situations which might create a need to amend the Zoning By-law include:

- a request by an individual to have the by-law amended;

...

O-8 In considering amendments to the Zoning By-law, it shall be the intention of Council to:

a) request a report from the development officer;

b) refer the matter to the Planning Advisory Committee for their report with respect to Policy O7(sic) (Criteria for Amendment to the Zoning By-law) and any other policies of this plan which affect the proposed amendment;

c) refer the matter to the appropriate provincial government Department (as identified in this Plan) where special advice is required; and

d) comply with all the legal requirements concerning amendments to the Zoning By-law as set out in ...the Planning Act. [p72]

...

Plan Amendments

O-13 ...An amendment to this plan shall be required:

...B) where a desired zoning amendment does not conform to the Generalized Future Land Use Map; and can be shown through studies to be desirable;

...

Actions Not Requiring A Plan Amendment

O-15 Areas immediately adjacent to a given land use designation on the Generalized Future Land Use Map (Map#5) may be considered for rezoning to a use which is similar in nature to the given designation without requiring an amendment to this plan, provided that the intents of all other policies of this plan are satisfied.

Excerpts from Land Use By-law of Pictou, Exhibit R-17
entitled Zoning By-law

[p3]...

Residential 1 R-1...

Highway Commercial C-3 ...

[p4]...

INTERPRETATION OF ZONING BOUNDARIES

3. BOUNDARIES BETWEEN ZONES SHALL BE DETERMINED AS FOLLOWS:

...

b. where a zone boundary is indicated as approximately following lot lines the boundary shall follow such lot lines....[p5]

f. where none of these above provisions apply, and where appropriate, the zone boundary shall be scaled from the attached Schedule "A"

...

[p6] 3... Where the provisions in this By-law conflict with those of any other municipal or provincial requirements, the higher or more stringent regulations shall prevail.

...

[p10] 20. No person shall erect more than one (1) main building on a lot except for:

a. buildings located in Commercial...Zones;...

...

[p11]

PARKING REQUIREMENTS

26. For every building...off-street parking located within the same zone as the use...shall be provided...:[p12]

a. a dwelling containing not more than three dwelling units.	One (1) parking space for each dwelling unit.

[p13]

1. All other commercial uses	One (1) parking space for each ...300 sq. feet of floor area.
...	
p. Retail stores	" " "

...

27. In...the Central Business District...a development shall be exempt from having to provide parking.

...

[p28] **GENERAL REQUIREMENTS FOR ALL COMMERCIAL USES**

ABUTTING ZONE REQUIREMENTS

...[P34]

HIGWAY COMMERCIAL C-3

1. Retail Shop

...

3. Restauraunt

...

[p40]

Part 13 - Definitions

...

[p41]

10) COMMERCIAL USE means any use by which retail or wholesale trade is carried out, and those other uses involving the sale of goods, materials or services.

...[p42]

13) DEVELOPMENT includes any erection, construction addition, alteration, replacement or relocation of, or to, any buildings or structure or any change or alteration made in the use of land, buildings or structures.

...

15) DWELLING means a building...occupied...as a home... .

...[p45]

32) MAIN BUILDING means the building in which is carried out the principal purposes for which the lot is used.

...[p46]

40) PARKING SPACE means...

...[P47]

46) **RESTAURANT** means a building or part thereof where food and drink is served to the public for consumption.[p48]

48) **RETAIL STORE** means a building or part thereof in which goods, wares, merchandise, substances, articles or things are offered or kept for sale directly to the public at retail....

[p50]

56) **STREET**...

57) **STREET LINE** means the boundary line of a street.

...

[p51]

63) **ZONE** means a designated area of land shown on the Schedules of this By-law.

SCHEDULE B

SELECTED EXCERPTS FROM TAPES OF ROBSON APPEAL DEALING WITH THE ISSUE OF THE CONTENT OF THE MUNICIPAL PLANNING STRATEGY OF THE TOWN OF PICTOU

Mr. Langley then rephrased his question thusly:

"Q. In your role as Town Clerk, then, Mr. Steele, would you be able to certify that as a copy of a plan that appears in the 1982 Municipal Planning Strategy?

A. Ah, I would have to first rather look at the map that was in the original.

Q. If you wouldn't mind taking a minute to do that then?

A. This would be the original. There is one difference between this map and that one that's there. This would be a copy of the Future Land Use Map that is with the Municipal Development Plan which is [Interjection by the Board R-13] yes.

Q. Maybe I can hold this up, Mr. Chairman, so we can all see it? By comparison this particular plan you've taken from Exhibit R-12, I believe, R-13? is this the same in all material perhaps you can coach me from the bench as to which Exhibit we have here is this the same in all material respects to R-12, and if not what in what respect do they differ?

A. Well, to my knowledge, the only difference is is that on this map there is a highway commercial area shown here, and on this area there is not and this is the original, ah Future Land Use Map, ah that was with the Development Plan approved in 1982.

Q. I believe that is part of the exhibit itself, Mr. Chairman, shouldn't that be introduced as a further exhibit?

THE BOARD: No. Or he's usin', I'm assuming there would be a similar copy back here so that R-12 is not part of any MDP or MPS that you've proven yet.

Q. Not as a 1982..?

THE BOARD: No, no. I just want to make sure my thinking is straight.

Q. So just to clarify that, then we might, Mr. Steele, you say this R-12 represents the original Generalized Future Land Use Map of 1982 with the exception of the small Highway Commercial Zone to the left of the larger egg-shaped Highway Commercial which includes the Watt property?
A. Yes.

Q. And do I take it that the one change reflects some zoning application made since 1982?
A. Yes, with a plan amendment that was made since 1982.

Q. Would that reflect in the minutes and so on? The meetings of Council since 1982?
A. Yes, it would.

Q. Having introduced the original plans, have there been changes to the MPS, the Municipal Planning Strategy for the Town of Pictou, since 1982?
A. Yes there have.

Q. And, ah, when have they taken place?
A. I couldn't give you the date. That amendment you see on that present map right there in 1986 there was an amendment, I believe it was June 12 it was approved on June 12, 1986.

THE BOARD: That's ministerial approval is it?
A. Yes.

THE BOARD: Yes.

Q. Were you involved with the meetings and so on that took place surrounding those amendments at that time?
A. Yes.

Q. Do you have copies of the various minutes of Council pertaining to the appeal process?
A. Yes.

THE BOARD: What's this? A series of minutes of Council?
Mr. Langley: A series of minutes of Council pertaining to Pictou Municipal Planning Strategy.

THE BOARD: I take it these are relevant, are they?
Mr. Langley: Yes , quite relevant.

THE BOARD: That would be what , R-15.
Mr. Langley: R-15.

Q. Just refer to R-15, Mr. Steele, would you have a look at those and relate to me what they represent?

A. They are a series of ah of copies of minutes which led to a plan amendment. Town Council had an application for rezoning and proceeded to amend the plan so that the rezoning could take place, and these are copies of the minutes for the Planning Advisory Committee met and technical reports from the planning, the Planning Commission, and the amendment that was made to the Planning Strategy. Also the advertisement that was placed in the local paper for the amendment.

Q. Does that exhibit contain all the minutes to your knowledge that for main meetings during that period?
A. Yes, I would say that all the minutes pertaining to this amendment are here.

Q. Now as a result of the amendment process, that you've now refered to was the Municipal Planning Strategy for the Town of Pictou revised?
A. Yes, it was.

Q.. And you have a copy of the revised version of that Strategy?
A. Yes.

Q. And is this the most up-to-date copy of the MPS for Pictou?
A. Yes, it is.

THE BOARD: R-16?
MS. WHITE: Yes.

THE BOARD: Now what is this we've got? We've got an MPS up here under R-11. Is this another copy of that same thing? It has got a different colour backer on it. Or is it an up-to-date one and the R-11 is a ...
MR. LANGLEY: This should be the same as R-11...

THE BOARD: If it is the same as R-11, why bring it in?
MR. LANGLEY: O.K.

THE BOARD: You know, I am not restricting if you want to duplicate or triplicate you're entitled as a matter of law to bring it in, but I can't see the point. I'm going to be confused enough anyway by the time I finish with three lawyers.
A. If I could just take a moment to check R-11...

THE BOARD: Don't count on it. Putting two MPS's in...
MR. ? : Mr. Chairman, (indistinct identification) May I ask a question?

THE BOARD: Yes. It's probably noon I would think unless somebody is...I'd like to finish the witness at least cross-examination if possible, if not ...
MR. LANGLEY: It shouldn't be a problem.

THE BOARD: We have already had our morning break as I recall.
MR. LANGLEY: If I may proceed?

THE BOARD: Yeah ah yeah. Have you decided whether you can use the one... or do you want to use the second one but bring it in. God help us if there is discrepancies, that is all I'm..,
MR. Langley: At the risk of confusing the Chairman, I don't think that is really going to be a problem.

THE BOARD: Yeah.
MR. LANGLEY: There is a difference in the map.

THE BOARD: Isn't that what [sigh] all right... Well, you put it in. This is the same fellow that certified the last one.
MR. LANGLEY: I didn't have a chance really to...

THE BOARD: No, I realize that,
MR. LANGLEY: Well I'll direct my questions to...

THE BOARD: Well, you know, his certification may be wrong. I don't know, in which case I don't know where that leads us.

Q. Well, just to go back into this again, to try to clear this up Mr. Steele, R-11 was introduced just earlier as an exhibit representing the most recent MPS for the Town of Pictou?
A. Yes, it was.

Q. The map taken from that text has been introduced as Exhibit R-11 as well initialled J.W. Can you tell us if the text, first of all, if the text of R-11 and the text of R-16 are materially different?
A. The text, I would have to say "No".

Q. Now having read through both copies, both are updated, have the same up-date on them, and they come from the Planning Commission as being accurate as of November 18, 1986. What is the difference, if any, between the two plans?
A. Well by the look of the maps there that came from R-11 it wouldn't be the same as the map, the Future Land Use Map, that comes from R-16. Just as recent as this morning, I was informed that by the executive director of the Pictou County District Planning Commission, Mr. Brown, that there is an error on this map. This Highway Commercial Zone which

extends east to the Town should have been should have not been extended. Should just have been left the same as it was on the original map.

Q. Now the original map, perhaps you can see it here?
A. Right.

Q. Exhibit R-12, you refer to as the original map?
A. Yes.

Q. And you are saying that the map included in the amended version of the Planning Strategy is different in what respect, again from R-12?
A. Compared to this?

Q. Compared to Exhibit R-12?
A. O.K. The map produced with the Exhibit R-11 has the shows the Highway Commercial Zone extended east into the Downtown where it should remain the same on R-12.

Q. That extension as reflected on R-11 shows a single Highway Commercial Zone opposed to two?
A. Yes.

Q. And, ah, to your knowledge does the extension of that Highway Commercial Zone in any way affect the Watt property through its location and so on?
A. No.

Q. The Highway Commercial Zone which is extended ah its a designation which allows the development of the property as Highway Commercial through development agreement with the Town. That has been extended eastwardly to include the property on both sides of the West River Road right into High Street and is that change that was brought about in the amending process in 1986?
A. Yes.

Q. So that just, again, to be perfectly clear there is no real plan change then in the plan itself or the map itself as a result of that amendment?
A. No.

Q. And the plan is that exist and that exists[ed] then is R-12?
A. Yes.

Q. With the exception of that one Highway Commercial designation?
A. Yes.

Q. On the left of the area in dispute, so to speak?
A.

THE BOARD: Mr. Langley, before we leave this point I'm concerned, you've brought some history of the plans and the development of the Plan, and I suppose that's relevant. I'm concerned that with what MPS and by what Minister was [that MPS Approved] available at the date the decision was made. Is it the same one that it is today? Which one is it? Which plan is in it? There can only be, as a matter of law, one correct one. I don't care how the plans were fouled up, or what was right or what was wrong. Which is the one that the Minister signed?
MR. LANGLEY: Our submission is that the Minister signed a single MPS which would be R-11.[BOARD Yeah] Originally produced, the text is identical in every respect to R-16.

THE BOARD: And he would have had to sign any amendment?
MR. LANGLEY: That's right. The amendments are made a matter of evidence at this point in that book that has been submitted.[BOARD Yeah, Yeah] and the only plan that has been acknowledged and approved by the Minister is this plan here R-12.

THE BOARD: So that is your position that R-12 is the only one that has been approved by the Minister?
MR. LANGLEY: Correct,
THE BOARD: Yep. And what is this witness saying on the subject as...?
MR.LANGLEY: I think we just tried to confirm any uncertainty about the plan that was introduced with R-11.

THE BOARD: There is an uncertainty in my mind now that I don't propose to leave until it's removed somehow or other and this is the only witness that can do it, isn't it? Because he's the one that has custody of the records.
MR. LANGLEY: The records themselves?

THE BOARD: Yeah. The records themselves. Would it be wise to leave him on that specific point with that specific question in mind and , perhaps, recall him after lunch when he has a chance to make sure what we are dealing with?
MR. LANGLEY: I have no problem with that.

THE BOARD: Other counsel?
MS. MACDONALD: No problem.

THE BOARD: Allright. I ... you know from my point of view I have got to define I don't care if it's totally censored, but I have got to determine somewhere what is the MPS

applicable to this area. There is only one MPS at any given moment.
MR. LANGLEY: Our position...
THE BOARD (interrupting): Is there some...you know your evidence is very careful and very clear but it has shown to me some doubt just what was, what it was..

MR. LANGLEY: If it helps further we will bring Mr. Steele back to make our position totally clear. It is our position that this plan is the only plan that has been admitted. This designated area is the only designated area...
THE BOARD: And your developer is saying that this is the only one he was shown.

MR. LANGLEY: Exactly.
THE BOARD: You know, and I'm not really you know that may be very germane what he was shown but I'm interested from this witness-not the other ones- but I'm interested from this witness who is the fellow in control of the records and has a duty to certify a court copy; I'm concerned that we get the correct copy, and I don't care if it has been burned out, censored or whatever, I want the correct copy. And counsel can get together with this witness and make sure that this witness knows I want the correct copy. I hope I have made myself clear. I have no criticism of you, but there should be no ambiguity of what is the correct copy in force at the time the decision was made, or in force today-which may be three different...you've dealt with '82, we're now dealing with '88 and you're dealing with a decision of '87. There may be three different MPSs. And, so I just want'em...I want it straight before I start.

Q. I take it then there have been no further amendments since 1986?
A. No, there hasn't.

MR. LANGLEY: Since we are finishing out this witness, Mr. Chairman, I suggest we enter the existing Land Use By-law as amended as well.
THE BOARD: Allright. That would be R-17, eh?

MR. LANGLEY: R-17.
THE BOARD: Certified by the same person?

MR. LANGLEY: It will be, yes.

Q. For you Exhibit R-17, Mr. Steele, would you tell us what that represents.
A. That is the Land Use By-law which is in effect in the Town of Pictou.

Q. That's of the day we speak?
A. Yes.

Q. And does that certify to you (cough by others) outlines of the existing By-law?
A. Yes, it is.

Q. Do you have extra copies there of them?
A. Yes.

Q. Now do you get involved with the rezoning application of the Robson ...?
A. Yes.

Q. And you had involvment with that since the initial application was made right through until the present time?
A. Yes.

Q. And were you in attendance at the various meetings of Planning Advisory Committee and Council on the matter?
A. Yes.

On cross-examination by Mr. Wilson, Mr. Steele had these questions and answers:

Q. Can you tell us, Mr. Steele, [which] one of the MPS Future Land Use Maps would have been available to your Planning Advisory Committee and Council and citizens at the times the application was dealt with? Would it have been R-11 or R-12?
A. Ah, R-11.

Q. R-11? So in attempting to interpret the text of R-11 or R-12 which I think we agree on, you would be working with, at that time, your R-11 map, is that right?
A. Yes.

Q. Yup. In fact it was only this morning that it was brought to your attention that the wrong map that had been circulated?
A. Yes, it was.

THE BOARD: In somebody else's opinion that we haven't heard from yet?
A. Yes, yes.

MR. WILSON: We are just trying to get Mr. Steele off the hook.
THE BOARD: He isn't off the hook yet.

MR. WILSON: I want to produce another exhibit

THE BOARD: R-20?

MR. WILSON: Yes.
THE BOARD: What does that purport to be?

MR. WILSON: It purports to be the amendments to the MPS and Land Use By-law, as certified by the Minister, in 1986 and as earlier referred to just the amendments taken out of the context of the strategy to help to deal with a couple of issues.
THE BOARD: Have you shown that to counsel for the other side?

MR. WILSON: I have already with a binder of the exhibits that I intend to use and they probably [can] turn to Tab 5 in that and they could probably to all exhibits.
THE BOARD: You want R-21 which is your booklet blue book , blue book,

Q. Please, Mr. Steele R-20 look at that and see if you what form you recognize those documents in?
A. Yes.

Q. That represents the textual document of the last amendments to your Strategy and Land Use By-law, is that correct?
A. Yes.

Q I direct your attention to bottom of page 4, this would be in Tab 5 of that exhibit, and it says 'the Pictou Land Use By-law is hereby amended as follows,' and refers to Table 3 of the bottom of page 4, this would be inside Tab 5 of that exhibit, and it says 'the Pictou Land Use By-law is hereby amended as follows,' and refers to Part 8 Table 3 page 34 of your Land Use By-law which, I believe, is R-17 in these proceedings. What that amendment means is that you are supposed to be able to turn to page 34 of the of R-17 and see some kind of an amendment. The text of the amendment is as follows: 'Council may by resolution under the authority of the Planning Act approve a development involving any of the Highway Commercial Uses listed in Policy B-6 A to be located along portions of the West River Road between the Rotary on Highway 106 and the boundary of the Central Business District.' Now, first of all, is that amendment as approved by the Minister reflected in the text of the Land Use By-law as introduced as an exhibit today?
A. Yes.

Q. Perhaps you could show me on Exhibit, I guess it's Exhibit R-17 wherever that is, the Land Use By-law,?
A. Yes.

Q. It refers to an amendment, I believe, ah, Part 8 Table 3 Page 34 of the Land Use By-law is amended as follows?
A. Yes.

Q. Is not the implication of that wording to call for agreement for development that takes place from the Rotary into the Central Business Core? ' A proven development involving any of the Highway Commercial Uses listed in Policy 6B along a portion of West River Road between the Rotary and the Central Business Core,'
A..Yes?

Q. That's what that amendment , that text, calls for, do you agree with that?
A. Yes.

Q. And if we read that text against this application, that puts it squarely in the area where the development agreement is called for, or does it not?
A. [silence]

Q. Is not this application located between the Rotary...
A. Yes, it is.

Q. And the Central Business Core? That's all on that point, thank you.

THE BOARD:...You have been called on, I take it, by various parties here to, again in your function of Town Clerk, and pursuant to the Evidence Act to certify various documents?
A. Yes.

THE BOARD: As being accurate and correct? Do you understand now that one must compare those documents before you certify them, not afterwards ?
A. Yes.

THE BOARD: Because, you see, tribunals such as this, courts such as this, rely automatically and are required to admit automatically those documents when they come and, ah, it's very dangerous if if if [stutter] a question comes up that we have to resolve and can't resolve because there is some inaccuracy. There is no sin, there is no crime, but the boards rely extremely heavily on the accuracy of the certification. So the tedious job of comparison has got to be done before they're produced and certified. Anything arising out of that?
MR. LANGLEY: Two comments, Chairman. I don't think Mr. Steele may really be qualified to comment upon the intent...

THE BOARD: Well we're not hearing a word you're saying.
MR. LANGLEY: [ALSO REFERRING TO HIS CLIP-ON MICROPHONE] Well, I think I'll handle it.

THE BOARD: Allright.
MR. LANGLEY: I'm not sure, Mr. Steele as he was suggested earlier on, may not be qualified to comment upon the actual intent of the plan. He can [BOARD interruption] and certify it, and that's fair. I accept that, but I [BOARD But you didn't object at the time.] I haven't objected because really want the whole issue [BOARD I suspect, you did and so do I.] However, his questions posed in Mr. Wilson take us into interpretation of the MPS and I think the answers will be forthcoming this afternoon through the planning officials that are here today. I can pursue that further with this gentleman but I really don't know if he is qualified.

THE BOARD: Well you've let it in. I won't restrain you at all because it's something new. Ah, the and and this person is basically the witness at least of Ms. MacDonald, although she is in the position to be able to cross-examine him, but I mean you know they are all of the same side, eh and a and a, so I don't want to restrain you at all and a but that's, your thinking seems to coincide with mine that I heard what he said. He has a great deal of experience, let's face it, many many years experience in municipal politics. He'd have some idea, or he should have some idea, what's going on with these amendments, so, that's where my thinking is at the moment. If you think that's an improper place for me to be left with this witness, then I would suggest that you proceed with the cross-examination[sic]. I know as a commonsense proposition that he knows something about [the] party [parties?]. I know he is not an expert. And I suspect there is very little in Pictou that he doesn't know something about. I would be very surprised if there...but I realize what you're saying, and I don't want to restrict you at all because I, -Some attention would be paid to his views on planning, but I know he's not the person who would ordinarily interpret the document. That would be better left to the lawyers, mind you, and the planners. But don't let me restrict you in any way because. I would let you have extra latitude with this gentleman because he is basicly, although he is your witness, he has been subpoenaed from the other side, and I understand that too. Or I suspect he has been subpoenaed. Or he is here on, certainly, from the enemy as far as you're concerned. There's the good guys and the bad guys from your point of view, and he is from the other side.
MR. LANGLEY: That's the way it is. Well I may pose a few questions...

THE BOARD: Don't let me restrict you, because I do pay some attention to an official that's had that much municipal experience. I realize, unconsciously, it's got to sink in somewhat.
MR. LANGLEY: I'll take my chances, the questions I pose.

Q. Mr. Wilson has referred you to the amendments in the MPS, this blue book and so on, R-20 the actual approved amendments that went through the Ministerial approval process and he made reference to the Policy 6A, I believe or B6, of the original Plan. Do you recall those questions?
A. Yes.

Q.Do you recognize any distinction between Policy 6 versus Policy 6A vis a vis the designation of Highway Commercial, C-3, and Highway Commercial by way of development agreement in the area from the Rotary to the Downtown Core as reflected on this Plan? Are there any, in your mind are there different parameters for those two considerations on that Plan? And, if so, in what respect?
A. Well, on that, on that plan, not really, but if we could look at this Plan, R-12, ah 1 believe it was the intent of PAC and Council when they were making the amendment to the Plan to ah extend the Future to extend this Highway Commercial Zone on the Future Land Use Map along West River Road into the Business District to the Town so that Highway Commercial development could would be allowed along that area through development agreement from [THE BOARD Sort of an extension south-easterly?] Yes. of this map R-12 excluding this original Highway Commercial designation.

Q. And what, how was that left, or was it changed at all? The original Highway designation?
A. Ah, It was left as it is.

Q. And, ah, do you know what, what requirements if any there are for one area versus the other in terms of direction?
A. In this area there is no requirement for a Municipal Development Plan. Excuse me , for a development agreement. The original area of Highway Commercial. In the extended area in the amendment, in the extended area, there is a ah, subject to development agreement.

Q. Do you know if the uses, the Commercial uses are more restricted in that area?
A. Yes they are.

Q. In terms of numbers...?
A. I would say I think that there are six uses listed in the amendment and there are ten uses listed in the original zone.

Q. Ten listed uses for the original highway Commercial Zone?
A. Yes.

Q. And you say six for the extended zone? Is that right?
A. Yes.

Q. And to your knowledge of the location of the property subject to this rezoning, does it fall within the original zone or not?
A. Yes, part of it falls within the original zone.

Q. Does any part of it fall within the extended Commercial Zone towards the south east?
A. Ah, I would say "not". I would say that the extended zone continues on from the easterly boundary of the original Highway Commercial Zone.

Q. And you attended all these various meetings regarding the amending process, is that correct?
A. Yes, I did.

Q. Ah, you can't read their minds, but you can perhaps make observations, was there confusion at the time of the amendment as to what this amendment was all about on the part of Town Council?
A. No.

Q. That's all my questions.

THE BOARD. I guess that's 5 to 12. Ah, thank you very much. Duh, you'll be checking to identify from this witness what's right and what's wrong in the MPS. Counsel, I take it, can take it under advisement. I think we'll adjourn 5 minutes early and, what, 1.30. I don't think it is likely we are going to finish today, is it? ...We left just before lunch were you able to reconcile the MPSs among agreement of counsel, It would be easier if we did, or is there still a difference?
MR. LANGLEY: There may still be a difference, you will hear from all counsel on it when we get into the issue. According to Mr. Steele, the Town Clerk, at the time the amendments went through in 1986 there was the original plan which is reflected here in Exhibit R-12 ('82) and in 1986 the only amendments that went through pertained to the written text. There is no submission of any new plan, as such, for approval, but the Minister at that time, that is the approval of the plan such as R-11, I believe it was,

THE BOARD: See, my problem is what did the Minister sign? There are plans in the MPS. That's what he signed. If so what plan was there?

MR. LANGLEY: Well, Mr. Steele's recollection is that there was simply texts. We can find out more on that subject through the Planning Commission who is here to address that as well.[THE BOARD:Allright] But our position is that based on what we have been told that is the situation as far as the approval is concerned.

THE BOARD: The MPS definitely contemplates the plan as being a part of it, and it has been represented to me this morning that these plans are part of the MPS.
MR. LANGLEY: And we hold out just the one plan. It doesn't do avoid the fact that there was a second plan kicking around.

THE BOARD: Kicking around! Yes I...
MR. LANGLEY: Where it came from, how is something else...

THE BOARD: So the problem is not resolved yet?...
You're hoping I can understand it before you finish. You see, my problem, I got to first find what the MPS is before I can check intents against it.
MR. LANGLEY: I understand.

THE BOARD: And what would be your position if there was no, in fact, no MPS? Would there then be no planning control? Have you contemplated from that point of view?
MR. LANGLEY: I don't want to even think about that, right at this moment.

THE BOARD: 'Cause that might be the result. If there is no MPS there may be no planning controls, which I suspect some people might not be satisfied with.
MR. LANGLEY: Well I'll address that later on. I call Terrance Brown."

Mr. Brown was asked if Exhibit R-12 accurately represented the 1982 MDP. On this issue he testified as follows:

A. Without detailed examination, I would say "Yes", with one exception, that the area on the west side of the Highway 106, an amendment approved back in '85 or '86, I've forgotten the date, which extended Highway Commercial Designation to the other side of the Rotary if you like.

Q. Are you referring, perhaps, to this area here I have circled with pen?
A. Yeah.

Q. That did not appear on the original plan?
A. It did not.

Q. That's been a subsequent addition to the plan?
A. Yes.

Q. The area of concern to this application, the somewhat large oval commercial area off the Rotary, was that part of the original Plan as of 1982?
A. Yes it was.

Q.Now what, in your mind, was contemplated by that designation at that time, what did the Highway Commercial Designation involve in terms of prerequisites and standards for rezoning?
A. Designation really means that Council will, if the haven't already, on some future date rezone properties in that designated area to the Highway Commercial Zone subject to certain policies in the bound document governing the zones.

Q. And what general parameters were there for development in that zone? What designated uses applied to that zone to your knowledge?"

Mr. Brown then reverted to the differences in the Town's plans in these exchanges with Mr. Langley:

Q. Now you've heard the evidence that preceeded your own about amendments that were made to the MPS back in 1986 or subsequent to that time. Perhaps with your help we can clarify any confusion that arises as regards to the plans that have been submitted as a result of that process. Were you directly involved in the amendment process in 1986?
A. I was.

Q. You attended meetings of Town Council during that time to deal with the subject?
A. Yup.

Q. And, ah, I am not sure if you have the exhibits or not, there is a packet there of Exhibits containing all the minutes of the various meetings, R-15. Would you take a minute to look at that Exhibit if you would, Mr. Brown, and perhaps confirm or otherwise tell us if those minutes reflect all the meetings that were held during that time?
A. I would have to say "Yes" to that question.

Q. I think to simplify things would you, in your own words, take us back to what initiated the amending process at that time, what got the ball rolling, and what was addressed in summary fashion, if you can, in terms of amending the existing Plan?

A. O.K. The amendment process began with application from a business know as "Sandy's Inn", the owner was Sandy MacKay, requesting the Council to amend the Zoning By-law to allow an, the expanding of an existing Highway Commercial use known as "Sandy's Inn."
Q. Could you just stop there, and I won't interrupt you unecessarily, and could you mark on the plan where this applicant was located?
A. Any particular mark required? [THE BOARD: "S"]

Q "S"? [THE BOARD: "S"]
A. That's existing right in this corner if I could call it "S1" was the site of the application that began the process.

Q. O.K. For clarification, then, the witness has marked the property on the north side of the West River Road to the east of the C-3 zone with an "S", that would be the location of the applicant?
A. Of the current or existing use, yes.

Q. And the property sought for rezoning was "S1" a little to the east again?
A. Right.

Q. Now what was the nature of that application? What was his zoning, prior thereto, and what was he seeking?
A. The zoning on the property up to next to the end was a residential zone, I can't remember whether it was R-1 or R-2, but it was in the residential zone and he wanted to apply around- Council change it to the C-3 zone to match the zone that exists on the Kirk Property.

Q. His existing property being "S", that was zoned for C-3 at the time, was it?
A. It was.
A.
In upshot, according to Mr. Brown, some of the confusion

expressed today

"was due to the existence of a map in a technical report governing the alternative 3 (or alternative "C", I think it was called). The map showed both that designation extending from that egg shaped all the way down to the Downtown Area. But that was not the amendment. The amendment was passed and went through the process. It was passed and went through the process and did not include a redesignation of the area simply because they were willing to allow the use to go in that area from the existing designation through to the downtown frontage along West River Road by development agreement. The development agreement being a little more flexible for Council to be able to control some of the impacts that that kind of use would have up against or adjacent to existing residential uses."

Mr. Langley continued the questioning as follows:

Q. You have your exhibit there with, I believe, all the attached maps, Exhibit R-15, would you flip into that and confirm that your technical report is included in that packet?
A. It is.

Q. And is your sketch that you alluded to also attached to that?
A. Yes, it is. It is attached after what I called at that time Alternative "C". It's the labeled as Schedule "A".

Q. Is the Schedule attached? It shows a single Highway Commercial area from Rotary to Commercial Core, as you call it?
A. Basically, yes.

Q. Now, again, just to make this more clear, am I correct in inferring in what you're saying that this area remained as C-3 commercial area with 10 designated uses throughout this amendment process?
A. Yes. And the uses would go by rezoning.

Q. And that the amendment process was dealt with land from the east of that area towards the Downtown Core?
A. Yes.

Q. And that the amendment dealt in that area with developing that those sides both north and south or east and west, I guess, West River Road by way of development agreement?
A. That's right.

Q. And that by way of development agreement, I mean there were restrictions to uses that went in that area?
A. There were fewer uses allowed by that process, yes.

Q. Would that amendment process have had any bearing whatsoever on the Watt property as such?
A. In my opinion, "No" , but the Watt property is in the Highway Commercial Designated area on the Generalized Future Land Use Map.

Q. Does the Municipal Planning Strategy, as amended, reflect two different types of zones within this area from the Rotary to the Downtown Core? This text?
A. I guess I"ll hestitate because the process is different. A rezoning is a slightly different process than a development agreement. A development agreement could end up with a C-3 designation on the site if it was so written, but it doesn't have to. A development agreement can stay with the land, the development through time.

Q. I guess what I am getting at, Mr. Brown, Mr. Wilson will undoubtedly ask-he has already asked- about the policy the Municipal Planning Strategy Policy #6 which provides, which seems to refer to a commercial zone, a single zone running from Rotary to Downtown Core. I don't want to anticipate his questions but I wanna' anticipate the answer you may give at this point by asking you now: "Is there a policy within the Strategy that it deals with the area that's to be developed by development agreement vis a vis, as opposed to the original area of C-3 designation?"
A. Yes. They're addressed differently in that amendment that was put through for Ministerial approval. They're addressed quite differently. The Highway Commercial Use in the designated area as shown there would go by rezoning. Those on the fronting along the rest of West River Road and the amendment reads "On portions of West River Road from the Rotary through to the Downtown Core." What is unclear at times, is what portions apply. I think by interpretation we have to conclude that what was meant there, and, I believe, what was intended was that there would be a difference in the process that would apply to the development proposals on either side of the line which basically stops at the Watt property.

Q. O.K. Can you explain to the Board how this map may have been come into being, given those comments? This is, I guess, R-11.
A. Yes. I believe that that technical error on the part of the planning staff, uhh, in responding to [unclear] the amendment, or proposal for amendment, called "Alternative C", I think the confusion existed at the time the map was adjusted correctly those maps may be floating around completely in error. That designation was not approved by the Minister, although it was talked about back at the Planning Advisory Committee level.

Mr. MacIntyre...went on to say:

Q. And what plan, if any, were you basing your report on at that time?

A. I was basing my report on the current Municipal Planning Strategy of Pictou which most recently been amended in 1986.

Q. O.K. Were you familiar with the amendments that took place to that plan in 1986?
A. Not prior to this application.

Q. You weren't involved at that time, yourself, in those amendments?
A. No.

Q. Ah, did you study the amendments in the process prior to making your Technical Report in August of'87?
A. [Ms. Macdonald's cough obliterated the answer]

Q. And, just without going through the report, what was your recommendation in the case of this application?
A. My recommendation was that the application to rezone should be approved in that it met the intent of the Municipal Planning Strategy.

Q. Now, just again, so as there is no uncertainty or confusion about the thought process that was involved here, ah, there has been reference made to the R-11 map of questionable origin I would suggest, and the R-12 map, the Generalized Future Land Use Map for the Town. In making your deliberations preparatory to this report, what of the two maps did you deal with or refer to?
A. I was dealing with R-11.The lower map. That was the map I believed to be the current map.

Q. And what is your understanding of this zone as shown on the original Generalized Future Land Use map, at the time, was it or was it not, in existence?
A. I was aware that that was the originally designated Highway Commercial area, that was the original map.

Q. And was that zone still existing at the time you made your report?
A. (indistinct) qualify that. Amendment prior to ah on the west showing Highway Commercial Designation and on the west of ah the larger portion I was not aware of that one. I was only aware of the 1982 original Generalized Future Land Use Map.

Q. O.K. But when you made your Technical Report up, when you researched this for preparation for giving your report, were you aware of the fact that this Highway Commercial Area here, the area in question, was still a designated zone on the Generalized Future Land Use map this map for Pictou?
A. Not in that form.

Q. In what form did you contemplate it when you were making your report?
A. I understood that the current maps showed the designation all the way from the Highway at the Rotary to the Downtown of Pictou as shown on Exhibit R-11.

Q. So you referred to R-11 when you were drafting your report?
A. Yes.

Q. And did you attach a copy of the map sheet to your report when you were making a report to the Town.
A. I didn't include a copy of the Generalized Future Land Use Map with the Technical Report, no.

Q. Is there a copy of the map sheet attached to your report?
A. The Technical Report has the reference map showing Pictou's zones on it.

Q. So, that is page 4 to your Technical Report?
A. Well, yes, it would be page 4.

Q. And that's just a portion of the zoning By-law map, for Pictou?
A. Yes. It's a representation thereof.

Q. Now under the technical assessment portion of your report on page 3, you refer in the second paragraph to the Town's Municipal Planning Strategy suggesting that this area of the West River Road was originally designated for Highway Commercial Use, is that correct?
A. Yes.

Q. Did you contemplate, or discuss with Council at the time, the necessity , if any, of having a development agreement for this site?
A. The issue did come up at PAC whether a development agreement would or would not be required, or whether it could be accommodated by a straight rezoning.

Q. In your opinion, was it a development agreement necessary at the time?
A. Based on my interpretation of the policy and the intent [indistinct] generated the amendment I felt that a straightforward rezoning was all that was intended for this portion.

Q. Where, in the sense of R-12, would a development agreement have applied, if anywhere?
A. According to R-12, the development agreement portion would be roughly where that Highway Commercial Designation

ends on the east or south east if you prefer and the Downtown the beginning of the Central Business District on West River Road.

Q. It would extend eastwardly from the eastern boundary of the existing C-3 area easterly to the Downtown Area?
A. Yup.

Q. And that area would normally be one where a development agreement would apply?
A. Yes. for selected uses.

Q. Was that discussed with Council at that time?
A. I submitted that to Council, in a separate report.

Q. Is that the Staff Report that is attached to the Technical Report?
A. Yes, it is. Well, actually, I don't have a copy of in evidence of ... I'm sorry it's underneath O.K. with the minutes, now

THE BOARD: You do have a copy of that Staff Report, then?
A. Yes.

THE BOARD: What exhibit is it in?
MR. LANGLEY: R-19.
A. R-19.

Q. If you could just refer to that Staff Report for a minute?
A. Yes.

Q. Was that report given the same date as the Technical Report?
A. Yes, it was.

Q. And was it from that Staff Report that the [indistinct] ensued about development agreements, where they're necessary and where they're not?
A. I don't believe there was lengthy discussion on the question of interpretation. There was, it was generally agreed that my interpretation as shown in my report was acceptable.

Q. That seemed acceptable at the time?
A. Yep.

Q. Is there any confusion in your mind or uncertainty about whether or not you were being accepted in terms of the presentation of your report?
A. I am not quite sure what you mean.

Q. Was there any uncertainty in your own mind that you were understood by those to whom you addressed the report as to your recommendation and the reason for it?
A. I can't really speak for PAC members. You would have to ask them.

Q. Well, based on your discussion, you were there, what did you see and hear?
A. There was no ah significant debate about the question of whether a development agreement would be required or whether a straight rezoning was appropriate.

Q. O.K. Can you tell us what gave rise to the introduction at the same time of the Staff Report?
A. The Staff Report was generated by myself and originated with me because of the map I understood to be the current adopted map for Pictou.

Q. Are you referring to R-11?
A. Yes, R-11. Created some confusion to my mind as to what provisions were actually in the Policy-4, the different types of uses.[THE BOARD: You too.]

Q. O.K. And with that as a background, what did you intend to address in your report in August of 1987?
A. I attempted to establish what area was in fact intended to be dealt with by development agreement and which area was to be dealt with as originally found in the plan by a straightforward rezoning. In other words, what was the actual basic Highway Commercial Designated Area and what was the Development Agreement portion of West River Road.

Q. I take it, you were at least aware of the existence of R-12?
A. Only in its original form. R-12 was, I did not realize that that was still that original page "A" , designation was still the current designated area.

Q. Had you seen anything to suggest that it was changed? Had you seen a different plan that was approved by Ministerial approval or any suggestion to the contrary?
A. I hadn't seen anything, any specific reference, to the change in the amendment pack, only that map that I assumed was the result of that amendment.

Q. O.K. Well, this referring back to R-11 again, are you?
A. Yes.

Q. Recognizing this may have been the map, Generalized Future Land Use Map you thought that was in effect at the time?

A. Yes.

Q. What was your understanding of the Planning strategy vis a vis the entire area shown on the map?
A. I concluded, given the intent of the amendment and the policy, that Council had intended for the originally designated area, that is egg shaped portion which would end probably at the Watt property, was intended for rezonings and beyond, between that point and Downtown would be intended by development agreement.

Q. Is that in fact what reflected in the map that you attached to your Staff Report?
A. The map which I attached to the Staff Report see essentially what I thought was the intent. Essentially that should be a distinguishing line between the Highway Commercial Area and the special development agreement area. It was purely for, it is purely diagrammatic, for demonstration purposes.

Q. Well, what would you have had the map look like? You say that is the map you were dealing with at the time. Were you attempting in the process to, if I can refer Chairman and others present, the map attached to your Staff Report. Were you suggesting at that time that the pictoral reference to the whole area be changed to reflect what you have on your map sheet?
A. Well, to actually effect the intent of the amended policy given that now the line would be required to separate the two designations.

Q. That's right, and that would be just off the fringe of the area we're talking about today, is that correct?
A. That were, in fact, proper now.

Q. So if the map were amended in the sense that you contemplated, you would show what in fact you have sketched out and attached to your Staff Report on this existing map?
A. Yes.

Q. Is that not in actual fact what does exist, given the Municipal Planning Strategy of Pictou at the present time?
A. In the context of the proper map [indistinct] speaks quite clearly to the true intent of where the portion of West River Road where Highway Commercial Uses are required to go by development agreement.

Q. And your understanding of that area would suggest what restrictions if any on a C-3 designation?
A. What restrictions on the designation?

Q. What designated uses would be permitted in one area and not in the other?
A. In the development agreement area there would be, I believe, six select uses, commercial uses which would be approved subject to agreememt with the Town.

Q. And in the area deemed C-3?
A. That would be subject, uses would be permitted as listed in the zoning By-law for a Highway Commercial C-3 zone.

Q. And how many in number are they?
A. I believe there are ten.

Mr. English ... had this to say:

Q. You're able to comment on those various subjects?
A. As best I can, yes.

Q. There has been an awful lot of discussion during the past few hours about ah the Municipal Planning Strategy and the Generalized Futire Land Use in Pictou. Are you familiar with, first of all, the Strategy and the Generalized Future Land Use Plan as adopted in 1982?
A. I am.

Q. And can you tell us if this Exhibit R-12 reflects the Generalized Future Land Use Map dating bck to its acceptance by the Minister in 1982?
A. It does except for the small area to the west of the egg shaped area.

Q. You're looking at this smaller Highway Commercial area just off the west portion of the area of concern?
A. Yes.

Q. And was that a subsequent amendment to the plan, do you know?
A. It was, yes.

Q. Were you involved with that amendment?
A. Yes.

Q. When the initial plan went through in 1982, I take it there were meetings with your committee and Council for public hearings, that sort of thing?
A. Many.

Q. Were you present for most of those?
A. After I was appointed to the in fact even before I was appointed the public meetings and after I was appointed I attended all of them.

Q. Of course at that time you were discussing the whole strategy, all facets of planning in the Pictou area, not just the zoning per se?
A. Yes, quite comprehensive.

...

Q. O.K. Now since the plan came into effect in 1982, and I guess maybe I have asked you this before and I will ask again, is this the plan to your knowledge which went through Ministerial approval in 1982? Except for that area there, eh?
A. Ah. I have the original copy in my book.

Q. Were you involved with the amendment process that happened with the MPS subsequent to 1982?
A. Since 1982? Yes.

Q. Can you tell us how that came about, what initiated the amendment?
A. That was an application by Sandy's Inn to rezone an area adjacent to their motel.

Q. If I could just stop you there, I believe this witness has marked the map with an "S" just to the east of the egg shaped area. Would that be the location of Sandy's Inn?
A. Yes.

Q. O.K. Carry on.
A. Ah, It was, I believe, my suggestion that rather than just do that particular property encompass all of the area from High Street west to the Highway Commercial area and include it in that amendment rather than just doing the particular one for Sandy's Inn in the anticipation that should other businesses in the area or wish to to expand or some residential property be bought out in the future and some commercial property development be established there that it would eliminate some of the paperwork and time involved to allow this development to occurr without having to amend the Municipal Development Plan further.

Q. Up until that point was there anything done in this area by way of Highway Commercial Designation to your knowledge? That is east from the existing egg shaped area.
A. Prior to that? No. Not that area, no.

Q. What designation did Sandy's Inn have, itself, at that time?
A. I believe it was C-3.

Q. And what was he seeking for his adjacent property?
A. I believe C-3.

...

Q. Now at that time did you see anything other than this particular map by way of Generalized Future Land Use Map of the Town, was any other map submitted to you as part of the amendment process, and, specifically, did you at that time see or refer to this map?
A. No. Today is the first time I have ever seen that map.

Q. Pardon?
A. I have never seen that map before this morning.

Q. That's R-11?
A. Yes.

Q. Do I take it from that comment, that you only dealt with this map, R-12?
A. Ah, yes.
THE BOARD: A variation of it. With a change on it.
MR. LANGLEY: The one that was in the Technical Report was the one that he actually dealt with at PAC.
THE BOARD: If I understand his testimony the map he was looking at was somewhat different by one respect, isn't that correct?
MR. LANGLEY: Apparently so.
THE BOARD: Yeah.

Q. O.K. We'll just take you ahead then. You've described the amending process. You say you are also involved with the application for rezoning by Mr. Robson, is that correct? I take it there were meetings and so on associated with that?
A. Yes.

...

Q. Now there's considerable been said today about the apparent confusion between the maps, applying that confusion to what may or may not have been understood about this application, perhaps. At the Planning Advisory Committee level, did you discuss the merits of the Robson rezoning?
A. Yes.

...

Q. O.K. At this meeting stage was this the only plan you dealt with, you say you haven't seen this plan here R-11 until today?
THE BOARD: He's continually said that he's never seen dealt with that plan, except as it now stands. It's an improper question to keep puttin' it to him. If you have the plan he considered then put it to him. Or preface your remarks with the question he puts in so he won't ...It's an unfair question on direct examination, I think, to put to the witness. I think if you are using a plan different from the one he said he studied. And putting it to him time after time, that " this is the plan that you studied"....[lost in

change of tape] correct plan there is nothing we can do about it, but that is not a right question to be putting to him.
MR. LANGLEY: I accept that Mr. Chairman.
THE BOARD: Thank you.

Q. O.K. ...

On the issue of the content of the MPS, Mr. Macleod had this to say:

Q. You're familiar with the Municipal Planning Strategy for the Town of Pictou?
A. Yes, I am.

Q. Could you indicate, please, in your opinion, as to which plan is currently in force and the map that is attached to the... ?
A. Ah, with that I would ask access to my notes, in my file. I have a copy available for the Board. I only have one copy, though.

MR. LANGLEY: I would think for simplicity. You're talking...the question was "What was the current plan in effect with that map." ? I believe evidence has alredy been submitted to the Board indicating which ones are currently in effect.
A. R-12. That is on the Board over there. In my opinion is the correct one being administered now.

Q. (MS. MacDONALD resumes) Have you Exhibit R-11 in your hands?
A. Yes, I do.

Q. Is that the updated Municipal Planning Strategy?
A. It is updated as indicated on this to November 18, 1987, or 1986, I'm sorry.

Q. Is that to your knowledge correct plan that is in effect?
A. Without goin' through all the sections I would say that it would be the closest, it would be the document that, any amendments would be there too.

Q. Thank you.

(MR . WILSON commences his cross-examination.)

Q. When this application came to the Commission for a Technical Report, which Land Use Planning Map was the Commission relying upon? Would it be R-11 or R-12?

A. I would say if it was that one it shouldn't have been. It should have been the one underneath, R-12. This particular one.

Q. You have put R-12 forward. Was it R-11 or R-12? Which one were you relying on when you prepared your opinion?
A. I did not prepare any opinion on this.

Q. Do you know which one the Commission which you, as a Development Officer, would have relied on when the opinion was prepared?
A. I would have seen...they should have been relying on R-12, that is the proper document.

q. Do you know which one they were using?
A. No.

Q. Are you aware that file came to the attention of the Town Clerk only yesterday morning?
A. No, I wasn't.
MR. LANGLEY: I believe it's R-11, Mr. Chairman. I think the evidence suggests R-11, not R-12 that came to the attention of the Town Clerk.

Q. At any rate, in your opinion as the Development Officer you don't know what which plan they used the staff used to prepare the report?
A. No.

Q. That's all.

THE BOARD: Mr. Langley?
MR LANGLEY: No questions, Mr. Chairman.

THE BOARD: I have a couple then. Ah, I can't, I'm sorry, Mr. Macleod, I can't... Were you here the rest of the hearing? May be you'll remember what was said? I thought somebody said that nobody got a report from the Development Officer on this scheme? Do you know, ah, who said that and if they said...they said it at this hearing. It doesn't really matter. Would you be the Development Officer who would be preparing that ...?
A. If I was requested, I would have prepared a report. I dicussed it with the planner, this particular case with the planner. I verbally discussed it, a number of cases with him.

Q. Before the decision , or after.
A. Pardon?

Q. Before the decision, or after?

A. Both.

THE BOARD: Anything arising out of that...Mr. Wilson?
MR. WILSON: Under the implementation provisions of the Strategy at the time for Pictou at page 70 of paragraph 4-8 "In considering amendments to the Zoning By-law it shall be the intention of Council to request a report from the Development Officer". You are the Development Officer?
A. Yes.

Q. Yeah. As a matter of course, does the application, ah, cross your desk?
A. Not initially. The procedure is that the request will go to Council. Council will then, as they have in resolution, will turn that over to the Planning Advisory Committee as you will find in that same document for consideration and appropriateness before the By-law can be amended, whether it is in line with the policies set down under the Plan. And then they, in turn consult with the planning department up until that first stage. Then it goes through that process. The meetings and meetings they are required to have. And then that, from that a report is given to Council as to whether they can proceed. That's when I become involved in the process.

Deputy Mayor Ferguson had been a Councillor (Ward III) when the Town had adopted the original MDP in 1982 and when then the amendments had been made in 1986. He had views of what made up these documents which are exemplified in the following excerpts from his evidence:

"Q. What was your understanding, Councillor Ferguson, of the amendments that were made in respect to Policies B-6 and B-6-A in regard to development agreements?
A. My understanding was that ah we had previously wanted to keep our business in the Downtown Core area and ah Council,and the PAC advising us, decided that we wanted to expand on that policy so thatr we would allow more business, more types of business, to establish from the Rotary on into Town, into the main area and that is what we set out to do.

Q. And what were the conditions, as you understood it with respect to the developing a business outside of the Downtown Area?
A. Well, as I understood it, the conditions were that ah the developer would have to come to the Town and negotiate a development agreement on any of the land that was already designated as C-3 on the zoning map.

Q. I see. I would refer you to the maps. One is R-12 up above and R-11 down below. Have you seen those maps before?

A. Yes, I am familiar with both of them. The R-12 is, I believe, the old map, the original map and the R-11 is one version of the map that is in use today. There is a third version and it seems to have a line across in the middle [THE BOARD: I'm sorry, I don't hear too well. I don't want to hear that.(Laughter) DEPUTY MAYOR FERGUSON: I can give you a copy. THE BOARD: Oh my!(sigh)]

Q. Which map, if any, were you considering at the time you were dealing with the Robson application?
A. The closest map is this one at the bottom, R-11.

Q. Now, I believe you have an exhibit there, R-18?
A. Yes.

Q. Yes. I refer you to the minutes of August 12, a meeting of the Planning Advisory Committee...
A. Right.

Q. Page 2 of those minutes indicates a vote that was taken on motion of Councillors Leblanc and Talbot, you've seen those minutes?
A. Yes.

At page 29 of the transcript of his evidence, Mr. Mason had this to say:

A. I feel that I can add to what I said before...Council is subject to criticism no matter which way it would have or could have come down, and that it's subject to a legitimate appeal, and I think...until this matter was straightened up, you know, if I was a voting member of that Council, I would have voted the matter down until it was clear as to what options...clear options, I would have had.

At page 59 of the transcript of his evidence he said:

A. I would be prepared to appeal that, and I would be prepared to win that on that single function....[p60]

MR.WELDON:...it's still a valid appealable item?
A. That's right....

In an interchange between himself and the Board concerning the decision of Council and the intent of the MPS, Mr. Mason had made the following rather revealing remarks commencing at the bottom of p63 of the transcript:

MR. WELDON: But you didn't say that it reasonably conforms with the decision...with the 'intent', did [p64] you?
MR. MASON: Well, starting from that end of the scale, and one can make the case that it does 'conform'.

MR. WELDON: But what's your opinion? Does it or doesn't it?
MR. MASON: In this case it can be said to 'conform with the intent' of the plan.

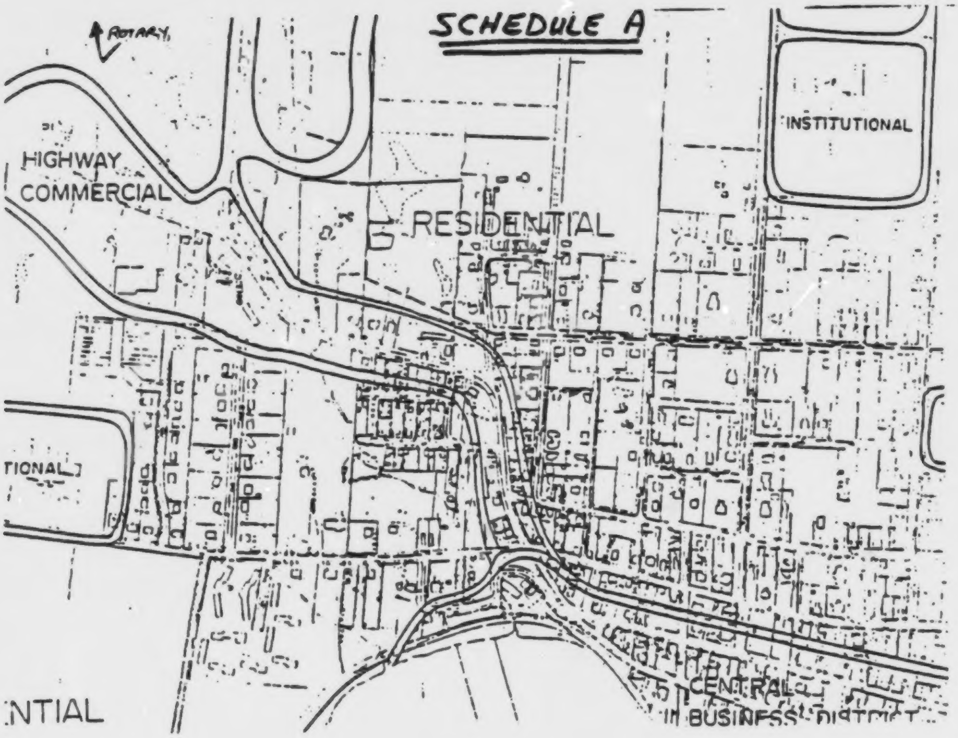
MR. WELDON: Of course, it 'can be said that' but what do you say?
MR. MASON: Yes, allright. I say first of all that no matter which way the decision came down, Council was in a no-win situation, and had an appealable situation in both cases. It was not against the intent of the Plan, not found to be 'against' it, and one is left with either a neutral position or one 'for'.

...

[p65]MR. WELDON: Now , is there a possibility that the proposal of the developer may also fall within the intent of the M.P.S. in this particular fact or circumstances?
MR. MASON: No, there is not. ...that would require a plan amendment as well as a rezoning.

SCHEDULE C

COPY OF PLAN RELATED TO ALTERNATE C (INCLUDED ERRONEOUSLY IN EXHIBIT R-11) FROM EXHIBIT R-15


SCHEDULE A
ROTARY
HIGHWAY COMMERCIAL
RESIDENTIAL
INSTITUTIONAL
TIONAL
NTIAL
CENTRAL BUSINESS DISTRICT

WILLETT ET AL v. MUNICIPALITY OF THE COUNTY OF HALIFAX

PLANNING - L.U.B. AMENDMENT - REFUSAL TO AMEND FROM R-1 TO R-2 AND R-4 - WHETHER DECISION REASONABLY CARRIES OUT INTENT OF M.P.S. - INTERESTED PARTY - MUNICIPAL BOARD ACT S. 27(4)- PLANNING ACT S. 63 - TIMBERLEA/LAKESIDE/BEECHVILLE M.P.S. POLICIES P-23; P-26; P-88; P-89.

W and S bought 2.38 acres of unserviced land in Timberlea in 1972. 1982 M.P.S. placed land in "Residential Designation" on Gen. FLUM and zoned it R-1. Services were installed in 1983. In 1987 the Applicant sought to rezone, some of the land to R-2 and some to R-4 for the purposes of 3 duplexes and 24-unit apartment building respectively. The proposal includes 7 driveways exiting onto the highway within 300 feet at the end of an "S" curve. Staff Report recommended approval but noted that the development might have an intrusive impact on surrounding residential areas. PAC recommended the rezoning to Council. After the public hearing, Council unanimously rejected the rezoning.

HELD; The Board dismissed the appeal.

Council need not adopt recommendations of staff. The public hearing may raise new issues that staff have not addressed. It is the members of Council who must consider the M.P.S. criteria and reach a decision as to whether or not the proposal should be approved. It is not inappropriate for Council to consider matters which will be reviewed at the subdivision approval stage. Council must be satisfied that criteria are met before permitting a mix of housing uses in an area designated for single family use.

NSMB-11-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S. 1983, C. 9, by **MICHAEL J. WILLETT** and **RENAULD SMITH** from a decision of the Council of the Municipality of the County of Halifax made March 21, 1988, which decision refused to amend the Municipality's Land Use By-law by rezoning a 2.38 acre lot located between Highway No. 3 and Nine Mile River at Timberlea from R-1 Zone to R-2 and R-4 Zones to allow construction of three, two-unit dwellings and one, twenty-four unit apartment building.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: MICHAEL WILLETT and RENAULD SMITH on their own behalf, Appellants;

ROBERT G. CRAGG, LL.B., on behalf of the Municipality of the County of Halifax;

ANNE H. FOURNIER, on her own behalf, Interested Person.

HEARING DATE(S): August 9 & 10, 1988.

BRIEFS SUBMITTED: August 31, 1988 - Appellants.

DECISION DATE: SEPTEMBER 16, 1988.

DECISION: APPEAL DISMISSED.

DECISION

MICHAEL WILLETT and **RENAULD SMITH**, the Appellants, purchased land in Timberlea, Halifax County in 1972 with the intention of building an apartment building and commercial outlet. At the time, services were being installed in the nearby Glengarry Subdivision and the Appellants anticipated that these services would be available for their property. This was not the case and, because on site services would have been difficult to provide, the land was left vacant.

When the Appellants purchased the property, it was zoned General. In 1982 the Municipal Planning Strategy ("M.P.S.") for Timberlea/Lakeside/Beechville (District 2) was put in place and the property was designated "Residential Designation" on the Generalized Future Land Use Map and was zoned R-1. The Appellants testified that, while they monitored the Public Participation process which lead to the M.P.S., they did not make an application to prezone their land on the assumption that such prezoning would not be permitted.

Services which could accommodate the property were installed in 1983 but due to high interest costs the Appellants did not begin serious considerations for developing the land until 1986. In 1987 they sought a rezoning in order to accommodate two apartment buildings. At the request of County staff they revised their original proposal. On October 9, 1987, they applied for a rezoning from R-1 (Single Unit Dwelling) Zone to R-2 (Two Unit Dwelling) Zone and R-4 (Multi-Unit Dwelling) Zone. The application was rejected by Council and the Appellants appealed to the Board.

The subject property is approximately 2.38 acres. It is located on the north side of Highway No. 3 in Timberlea. It is bounded on the west and north by the Nine Mile River. It is in a natural state. The land slopes down from the highway some

12 to 15 feet most of the slope occurring close to the highway. There are single family homes surrounding the subject property. A Nova Scotia Power Corporation Right-of-way runs across the property near its border with the highway.

It is proposed that the property be subdivided with different zones. An approximately 8,000 square foot lot on the west is to be zoned R-2 on which one semi-detached unit is to be built. The middle lot is to have a 35-foot R-1 buffer zone along the Nine Mile River and the balance of approximately 46,500 square feet is to be zoned R-4 to permit a 24-unit apartment building. The third lot on the east is approximately 32,000 square feet and is to be zoned R-2 on which two semi-detached units are to be built. The proposal will require that 7 driveways exit onto the highway within a 300 foot frontage which is located on the end of an "S" curve.

Council considered the proposal at a Public Hearing held on March 21, 1988. The Staff Report recommended approval but noted it "would be difficult to completely disguise the intrusive impact of multiple-unit development at this location". The Planning Advisory Committee also recommended approval. A petition containing the names of 350 residents opposed to the rezoning on the grounds: "that such a high density use does not conform with the intent of the Municipal Development Plan...", was presented at the Public Hearing. Four members of the public spoke in opposition to the rezoning including Anne Fournier, and David Greenwood, Chairman of the Municipal Planning Strategy

Review for District 2. Both Appellants made presentations. Councillor Rawding and two other Councillors asked questions of the Planner. Council voted unanimously to deny the request for rezoning.

At the Board's hearing both Appellants testified. They emphasized that both the Planning Staff and the Planning Advisory Committee had recommended that Council approve the rezoning. They felt that they were not given a fair hearing at the Public Hearing because no questions were put to them nor were they requested to provide additional information.

Councillor Bruce Rawding testified regarding his and other residents' concerns about the proposed development. Mr. Ralph Wheadon, who lives opposite the subject property, and Mr. and Mrs. St. Clair Beuree, who live immediately adjacent to the subject property on the east, testified as to their opposition to the proposal. Mr. & Mrs. Beuree stressed the flood conditions. In the winter it is not possible to drive down their driveway which has the same slope as the subject property. They were concerned that development on the subject property would increase the flooding.

The Municipality called John Heseltine, Chief Planner with Porter, Dillon Ltd., formerly with the City of Halifax, who was qualified as an expert in planning matters. He testified that Council did not have enough information to approve the rezoning and that the question of possible flooding problems was sufficient to reject the proposal. He further stated that

Council's decision was consistent with the M.P.S.

Mrs. Anne Fournier, who the Board determined was an Interested Person within the meaning of Section 27(4) of the Municipal Board Act, did not testify. In argument she stressed that it was the intention of the drafters of the M.P.S. that low density be maintained in the area and that a 24-unit apartment building was not appropriate since it was a high density use.

The Appellants set out a number of grounds of appeal which can be summarized as follows:

1) the proposal meets the requirements of Policies P-23, P-26, P-88 and P-89 of the M.P.S. and certain matters are subject to detailed review at the subdivision approval stage;

2) that Council did not consider the need for a housing mix and that the M.P.S. does not limit all future development to R-1;

3) that Council's decision was not based on good planning principles, ignored written documentation from government agencies and did not quote evidence to overrule staff's recommendation;

4) that resident's concerns were unsubstantiated.

On an appeal under Section 63 of the Planning Act the Board may only allow an appeal if it finds that Council's decision "cannot reasonably be said to carry out the intent of the Municipal Planning Strategy."

There are four policies in the M.P.S. that are most relevant to this appeal and they are as follows:

"P-23 Within the Residential Designation as shown on the Generalized Future Land Use May (Map 1) it shall be the intention of Council to preserve the existing single unit dwelling residential environment with its associated institutional and open space uses.

P-26 Notwithstanding Policy P-23, Council may consider low density residential developments which are of a scale and location not inconsistent with existing neighbourhoods. In this regard two unit dwellings may be permitted by amendment to the zoning by-law and with regard to Policy P-89.

P-33 Notwithstanding Policy P-23, within the Residential Designation, and where municipal central sewer and water services are available, Council may consider permitting multiple unit dwellings by an amendment to the zoning by-law. In considering such amendments, Council shall have regard to the following:

(i) the availability and capacity of water and sewer services;

(ii) the adequacy of access by way of collector or arterial streets;

(iii) separation distances from low density residential development;

(iv) the location and appearance of access and parking areas;

(v) the provision of amenity areas; and

(vi) the provisions of Policy P-89.

P-89 In considering amendments to the zoning by-law or development agreements, in addition to all other criteria as set out in various policies of this Plan, Council shall have appropriate regard to the following:

(i) that the proposal is in conformity with the intent of this Plan and with the requirements of all other municipal by-laws and regulations.

(ii) that the proposal is not premature or inappropriate by reason of:

(a) the financial capability of the Municipality to absorb any costs relating to the development;

(b) the adequacy of sewer and water services;

(c) the adequacy of road networks leading or adjacent to, or within the development; and

(d) the potential for damage to or for destruction of designated historic buildings and sites.

(iii) that controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of:

(a) type of use;

(b) height, bulk and lot coverage of any proposed building;

(c) traffic generation, access to and egress from the site, and parking;

(d) open storage and outdoor display;

(e) signs; and

(f) any other relevant matter of planning concern.

(iv) that the proposed site is suitable in terms of steepness of grades, soil and geological conditions, locations of watercourses, potable water supplies, marshes or bogs and susceptibility to flooding."

Policy P-23 is a mandatory policy while policies P-26 and P-33 are discretionary. The overall intent of the Residential Designation on the Generalized Future Land Use Map is the preservation of single family dwellings.

Policy P-26 allows Council to permit two unit dwellings which are of a scale and location not inconsistent with existing neighbourhoods. In the Board's opinion, before permitting two unit dwellings, Council must have information respecting the existing neighbourhood and the proposed dwellings in order to determine whether the scale and location of the proposed dwellings are consistent.

Policy P-33 allows Council to consider permitting multiple unit dwellings provided Council has regard to certain criteria. Among the criteria is "the provision of amenity areas". In addition the Land use By-law requires an amenity area of not less than 100 square feet per dwelling unit. There is no indication on the plans submitted of where such amenity areas are to be located. The Staff Report makes no mention of amenity areas. While the Appellants point out there is enough square footage on the proposed lot to provide the required amenity areas, it is a matter which should have been addressed in the original application and Staff Report.

Both Policies P-33 and P-89 require Council to consider the access and egress to and from the site. While the Department of Transportation has written a short note that the lot meets "this Department's stopping sight distance requirements", it appears that further analysis is required given the steepness of the lot adjacent to the highway, and the proposed seven driveways on a curve.

Among the issues which were raised at the Public Hearing by those in opposition to the proposal were the following:

- potential flooding of neighbouring properties;
- overcrowding in the schools in the Timberlea/Lakeside area;
- geological conditions of the site and lot grading;

- the current M.P.S. is under review;
- parking;
- separation distances from low density residential areas;
- traffic problems;
- the apartment building would not blend with the character of the area;
- serious safety concerns in having seven direct access points to Highway No. 3 on a curve;
- steepness of the grade from the highway to the river.

All of these matters are ones which Council must consider before approving a rezoning from R-1 to R-4.

The Board had occasion to consider Policies P-23 and P-26 of the M.P.S. in Glengarry Developments Ltd. v. County of Halifax (1986) 5 M.B.D. 445. The Board noted the mandatory requirement of P-23 which protects the single family residential environment. The Board, however, permitted a rezoning to R-2, pointing out "the comparative isolation of the subject lands...from existing housing" and stating that 20 double housing units would not effect "the integrity of the existing family" homes. In the present case the subject property is not isolated and while the impact of 3 duplexes may not be great, a 24-unit apartment building and accompanying parking lots will have, as stated in the Staff Report, an "intrusive impact" on the area.

In the brief which was filed by the Appellants, they emphasized that the Planning Staff had recommended approved. The Appellants appear to be under the impression that Council must adopt the recommendation of staff. This is not the case. Staff reviews the application and based on the information that they have received, Planning Staff will generally make a recommendation indicating whether or not the proposed development is permissible under the M.P.S. This recommendation, as is the one by the Planning Advisory Committee (P.A.C.), is made before the Public Hearing is held. In this case a number of issues were raised at the Public Hearing which had not been considered by either staff or the P.A.C. It is the members of Council who must consider the various criteria and reach a decision as to whether or not the proposal should be approved. On an appeal the Board must determine whether Council's decision reasonably carries out the intent of the M.P.S.

The Board has the following comments on the grounds of appeal which are summarized earlier in the decision. With respect to Ground (1) all requirements have not been met. Since P-89 requires that the proposal be in conformity with the requirements of all by-laws it is not inappropriate for Council to consider matters which will be reviewed at the subdivision approval stage.

With respect to Ground (2) the approval of R-2 and R-4 amendments are discretionary. Council must be satisfied that the criteria are met before permitting a mix of housing uses in an area designated for single family use. All the criteria had not been met.

With respect to ground (3), Exhibit W-1 contained correspondence between the planning office and various government departments and other county staff. The Board agrees with the comments of the Municipal Solicitor that some of the responses from these agencies were perfunctory. In contrast, the memo from John Sheppard, Manager of Storm Drainage, raises serious questions about the proposed development. These questions were not brought to the attention of the Appellants nor does it appear that the Planner had satisfied himself that the matters raised could be resolved. The issues of possible flooding and other environmental damage are ones which should have been resolved before any approval could have been given. There is no evidence before the Board that Council received copies of this correspondence. The evidence does not support the allegation that Council's decision was not based on good planning principles.

With respect to the final ground of appeal, the Board is not convinced that the residents' concerns are unsubstantiated. The memo from John Sheppard, referred to above, raises similar questions.

The Appellants further argue that the M.P.S. not only encourages but "directs Council to consider rezoning applications to utilize the municipal services". Council has considered the application. Both Policy P-26 and P-33 are discretionary while Policy P-23 is mandatory. Issues of concern were raised at the

Public Hearing and Council obviously was not satisfied that the development as proposed was an appropriate case in which to exercise its discretion to permit the rezoning.

The Board is satisfied that Council's decision to refuse the rezoning is reasonably consistent with the intent of the M.P.S. and dismisses the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 15th day of September, A.D., 1988.

Linda D. Garber

LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

EISENHAUER v. MUNICIPALITY OF THE COUNTY OF HALIFAX

PLANNING - L.U.B. AMENDMENT - REFUSE TO REZONE R-1 TO R-4- MEDIUM DENSITY RESIDENTIAL ZONE - APARTMENT BUILDING - WHETHER REASONABLY CARRIES OUT INTENT OF M.P.S. - AMENDMENT OF NOTICE OF APPEAL - WORST CASE SCENARIO - NOT HEARING DE NOVO - MUNICIPAL BOARD ACT S.S. 16(1); 23 - PLANNING ACT SECTIONS 63; 63(1); 63(1A)(b); 63(3); 63(5); 63(7)(a)(b); T/L/B M.P.S. POLICIES P-23; P-26; P-33; P-89 - RULES ON PLANNING 2(1); 2(2); 6(1); 6(2).

E applied to rezone .92 acres on Bay Road from R-1 to R-4. The rezoning would permit a maximum of 27 apartments. The lot contained a dilapidated house of three units (only one occupied) and some dilapidated outbuildings. E frankly stated the purpose of the rezoning was to enhance the market value of the land. The Planners recommended rejection of the application. The Appellant called no planner to give evidence. The Appellant attempted at the hearing to amend the Notice of Appeal.

HELD: The Board dismissed the appeal and confirmed the decision of Council.

The Notice of Appeal was sufficient to support the evidence adduced. There is nothing incongruous in accepting, as admissible, the opinions contained in the Staff Report. The Report formed part of the record. Board proceedings are in the nature of appeals, not hearings de novo and therefore the Board can look to the record.

Since the rezoning was for the stated purpose of raising the purchase price of the lot, the Board held that on this type of application the Planners were entitled to test the application by the "worst case scenario". In the Board's opinion, based on its view of the site alone, the proposed rezoning was suitable. It is not the function of the Board to substitute its opinion for the decision of Council. The Board cannot substitute its subjective opinion for the advice to Council by its planners.

Policy P-23 permitted Council to encourage low scale residential development. The planners wanted to see the development and impact of a previously approved R-4 approvals before approving this particular scheme. The planner felt that approval was premature. This advice was consistent with the intent of the M.P.S.

NSMB-16-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An appeal under the Planning Act, S.N.S., 1983, C. 9, by **W. EISENHAUER** from a decision of the Council of the Municipality of the County of Halifax made June 13, 1988, which decision refused to amend the Municipality's Land Use By-law by rezoning property located at Civic No. 1380 Bay Road, from R-1 to R-4 Zone.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: W. EISENHAUER, Appellant, on his own behalf;

ROBERT G. CRAGG, LL.B., on behalf of the Municipality of the County of Halifax.

HEARING DATES: 10:00 a.m. SEPTEMBER 14, 1988, and
7:00 p.m. SEPTEMBER 14, 1988.

DECISION DATE: SEPTEMBER 30, 1988.

DECISION: **Appeal Dismissed.**

DECISION

This is an appeal under the **Planning Act**, S.N.S. 1983, C. 9, by **W. EISENHAUER** from a decision of the Council of the Municipality of the County of Halifax made June 13, 1988. Council refused in this decision to amend the Municipality's Land Use By-law by rezoning property located at Civic No. 1380 Bay Road, from R-1 to R-4 Zone.

Under Section 16(1), C. 9, S.N.S. 1981, the **Municipal Board Act**, the Chairman assigned Board Member Richard L. Weldon to hear this planning appeal.

The Board heard this appeal on the September 14, 1988, sittings beginning 10:00 a.m. at the Lakeside Fire Hall, Mira Street. The Appellant requested an evening Board hearing. The Board held a separate 7:00 p.m. hearing to accommodate this request.

The Notice of Appeal of this rezoning appeal for refusal rezoning is undated. The Appellant filed it with the Board on July 4, 1988, at 8:30 a.m.

Mr. Cragg, for the Municipality, took objection to the grounds of appeal, which grounds are set out as follows:

> "THE GROUNDS FOR THIS APPEAL ARE:
>
> 1. Planning report was not updated to include information on next lot.
>
> 2. Rejection was based partly on information that refered (sic) to another property".

At the start of the hearing, Mr. Eisenhauer attempted to introduce an amendment to this Notice of Appeal. He wanted an appeal ground that the decision of Council was contrary to the intent of the applicable Municipal Planning Strategy (M.P.S.) Mr. Cragg objected to introducing that ground of appeal then.

The Board reserved its decision on the necessity of an amendment to the Notice of Appeal. It delayed its consideration of whether or not the existing Notice of Appeal restricted the evidence the Appellant might call. The Board decided to hear all the evidence tendered on the merits of the appeal. It would then decide the issue of the admissibility of any evidence objected to all in the same decision.

The Vice-Chairman had extended the time for filing the undertaking cost of advertising for the Notice of Hearing. The Appellant followed those instructions.

Subject to the reservations made above, the Board satisfied itself that otherwise the Appellant completed all preliminary matters. With the agreement of the parties, the Board took jurisdiction to hear the appeal on its merits. Mr. Cragg did not strongly push the exclusion of the evidence which he felt did not follow the filed Notice of Appeal. He felt, however, that the proper content of a Notice of Appeal in planning matters was worth some comment in the decision.

W. Dale Eisenhauer, the signatory Appellant has applied to rezone the land of his mother and deceased father. He applied to rezone .92 acres of land, on the south side of the main highway (Old Route 3 or the "Bay Road") running through Timberlea.

A building that looks like a two-storey house sits on the lot. It contains two apartments. It formerly contained three.

The lot lies on a relatively level piece of land at road level. You see it on a diagram contained in Exhibit E-7, "the Municipality's Booklet". There it is the area cross-hatched and identified as "1380 Bay Road, Lot to be rezoned from R-1 to R-4". To its immediate west is a larger lot already zoned R-4 which is at a higher elevation marked "78A-85".

Immediately adjacent to the East of that R-4 lot is a lot on which is St. Luke's Church lot marked "P-2 Church".

Across the Bay Road are two R-2 houses located on conventional size lots immediately opposite the subject property on the Bay Road.

Slightly to the West of there the Plains New Road intersects the Bay Road. Plains New Road feeds a large area of mostly undeveloped R-1 land.

To the West of the property, and at slightly lower elevation, is more R-1 land. This R-1 land has developed in a ribbon-like manner along the Bay Road. This R-1 land contains single family homes.

To the south and rear of the lot in question Munro Subdivision lies. This is a subdivision of single family homes constructed on the modern lines of internal subdivision roads and is a recent development.

The subject lot, as well as the other lands mentioned here, is serviced by sanitary sewer and water services. All gain access along the Bay Road.

On a view of the site, the Board saw the land to be lying considerably lower than the Munro subdivision. It is also considerably lower than the adjacent R-4 land. It is on or about the same level as adjacent R-1 land. The main building on the subject property is in indeterminant repair. The out buildings are unsightly.

The evidence has shown that the Council rezoned the adjacent land to the east R-4 some time ago. Although some development work has occurred on this adjacent land, it contains no buildings. The Church and the owner of the R-4 land have a current property dispute as to their common boundary. This boundary dispute may be creating some delay in development.

The Board will first deal with Mr. Cragg's objection to the contents of the Notice of Appeal. He says the Notice of Appeal does not show any grounds of appeal which the Board can pursue.

A refused applicant for rezoning may appeal the refusal to the Nova Scotia Municipal Board. His right of appeal appears in Section 63 of the **Planning Act.** Nowhere in the sections following Section 63 are the contents of the Notice for this type of appeal set out. Under Section 23 of the **Municipal Board Act**, the Board, with the approval of the Governor-in-Council, made Planning Rules. Rule 2(1) says as follows:

> "Every appeal to the Board shall be notice in writing and shall set out **clearly and concisely** the decision appealed from or the effect of that decision, the person who made the decision, the date of the decision and **the grounds of the appeal**; and if no decision has been made but the appeal is from a refusal, failure or neglect to make a decision within a limited time or at all, then the Notice of Appeal shall set out the decision that has been sought, the person from whom it has been sought, the date on which the request for a decision was made and that no decision has been made. [Emphasis is that of the Board].
>
> (2) A Notice of appeal may be in Form "A" or Form "B" in the Schedule or to the like effect".

Once the Board receives a timely Notice of Appeal the Board appoints a person to peruse that Notice of Appeal under Rule 6(1) which reads as follows:

> "Upon receipt of a Notice of Appeal, the Board or some person appointed by it for this purpose, shall examine the Notice of Appeal to determine whether or not it complies with the Act and these Rules.
>
> (2) If the Board or the person so appointed is not satisfied that the Notice of Appeal complies with the Act and these Rules, the Board or the person shall given notice to that effect to the Appellant and may give the Appellant an opportunity to amend the Notice of Appeal within a time limited by the Board".

The Board notes that it appointed Vice-Chairman Garber to examine the Notice of Appeal. Vice-Chairman Garber requested the Appellant to file his Undertaking to pay the cost of advertising the Notice of Hearing.

The **Assessment Act**, R.S.N.S. 1967, C. 14, has specific provisions in it spelling out the contents of the Notice of Appeal to the Board. The present Section 100(4) of the **Assessment Act** which has been in the Statute since 1978, says as follows:

> "A Notice of Appeal shall state with particularity the grounds of the appeal."

The Board, in assessment appeals, has given that section of the Act an extremely broad interpretation. It has accepted a timely Notice of Appeal deficient in the content apparently required by Section 100(4) of the **Assessment Act**. The Board believes the Supreme Court (Appeal Division) likewise has interpreted that Notice of Appeal provision. The Board and the Supreme Court Appeal Division have both not struck down some assessment appeals because of defective Notices of Appeal.

The **Planning Act** does not so emphasize the contents of the Notice of Appeal as does the **Assessment Act**. Law prescribing the contents of the Notice of Appeal in planning matters is in the form of "secondary Rules" legislation. The Legislature wrote Section 100(4) of the **Assessment Act** directly into the law.

Under the **Planning Act**, the Board has frequent occasions to deal with appeals begun by people unskilled in the law. These people are dissatisfied with the results they received at Council. They wish to have their case heard by an independent tribunal on its merits. The Board is not a court and must deal with planning appeals in an informal quick manner.

The Board believes the legislation requires that the Board hear the merits of a timely appeal made by any person. On the other hand, the Board realizes that the Respondent should have some idea of the possible case pending against it. That knowledge first comes to the Respondent in a formal way in the Notice of Appeal. For that reason the Rule is as it is when it requires the Notice of Appeal "to set out clearly and concisely...the grounds of appeal".

The Board feels that experienced counsel (e.g. Mr. Cragg) know Appellants have limited appeal grounds available to appeal a rezoning refusal decision.

Section 63(3) and Section 63(5) of the **Planning Act** set out the main basis of appeals to this Board. These Sections deal with the intent of the Council. They deal with whether the decision of Council reasonably carries out the intent of the M.P.S.

In addition, in an area in which there is an M.P.S., additional bases for appeal may apply. They deal with the "undue hardship to an applicant or extraordinary and compelling circumstances". The Board sees no other bases for appeal available to Appellants classified as refused applicants on a rezoning appeal.

There can be no surprise to the Respondent in this case. The Respondent Municipality would not be at any loss knowing the relatively limited grounds of appeal applicable. The Board seeks the proper disposal of all meritorious planning issues. It finds the Notice of Appeal contains appeal grounds raising Sections 63(3); 63(5) and 63(7)(a) and (b) of the **Planning Act.**

The Board also notes there are draft Rules being considered by the Board and Governor-in-Council. If approved in their present form, the new Rules allow the Board to consider Notice of Appeal amendments at the hearing.

The Board believes it has no power to amend the Notice of Appeal at the stage requested by the Appellant. It finds that the Appellant filed Notice of Appeal filed on time. Implicit in the Notice of Appeal are the Applicant's appeal grounds available to him. With sympathy for Mr. Cragg's argument, the Board nevertheless finds there is a valid Notice of Appeal raising all available Appellant's issues. Thus the Board determines that it has full jurisdiction to hear this appeal on its merits.

If the Board has erred in so finding, its error makes sure that the Appellant's appeal has a full merit hearing.

Mr. Eisenhauer testified himself. Mr. Cragg called one witness, Paul Morgan. Helen Dorrington, a member of the audience, testified on her own behalf.

Mr. Eisenhauer testified that his father was an original owner of this land. His dad had applied for a commercial zoning to make a junk yard on the lot. Mr. Eisenhauer, Senior, withdrew this application. He made another application to have the lot rezoned from R-1 Zone to R-4 Zone. Mr. Eisenhauer felt that rezoning reflected the existing use.

Mr. Eisenhauer said the zoning history of the property showed the property successively zoned General, then R-1. He said that in the past the property bore on several occasions various different commercial uses and also multiple residential uses. He said it was still in the multiple residential use.

Mr. Eisenhauer felt that the rezoning to R-1 done before had devalued his land. He thought he should be able to apply to have his land brought back up in value by rezoning it to R-4.

Mr. Eisenhauer said while the application to rezone was in process, his father had died. Mr. Eisenhauer said he was taking over, on behalf of the family, the application to rezone and the subsequent appeal. He said he acted with full authorization.

Actually Mr. Eisenhauer is both an Applicant and agent for other Applicants. For convenience, throughout this decision, the Board will treat Mr. Eisenhauer as the Applicant.

Mr. Cragg called Paul Morgan, an employee of the Municipal Planning Department. Mr. Cragg did not attempt to have him qualified as an expert planner entitled to give opinion evidence on planning matters.

The Board notes that it is common for everybody to have opinions on planning matters. The Board frequently hears everybody's opinion regardless of their qualifications seeing all citizens have a deep interest in planning. If such persons have come before the Board, the Board must listen to their opinions. Then the Board must try to identify those opinions the Board thinks appropriate to the appeal.

The nub of the appeal is whether or not the decision of Council reasonably fits within the intent of the M.P.S. When someone employed as a professional planner gives opinions concerning that nub, the Board feels good practice requires his expert qualification. Such expert qualifications makes his opinion evidence conventionally admissible.

This witness, Mr. Morgan, was very crucial to the Municipality's case. The Board recognizes Mr. Cragg's right not so to qualify any of his witnesses. The Board can only guess why he refused to qualify Mr. Morgan as a planning expert.

The Board, in these circumstances, disregards Mr. Morgan's sworn opinion that the decision of Council reasonably follows the intent of the M.P.S. The Board must make its decision in total disregard of those thoughts as expressed before it by Mr. Morgan.

No other planners or purported planners testified before the Board as experts. The evidence remaining before the Board concerning this application appears in the Exhibit, Exhibit E-7.

The Board reluctantly excludes the opinion portion of Mr. Morgan's evidence. Thus it avoids the prejudicial effect the expressed opinion of a "planner" would have on the Board's mind concerning the appeal's nub.

Mr. Cragg, in advancing that opinion, evidence assumes the burden of proof of adducing that evidence. The opinion of the witness bears on the main issue of the appeal. The occupation of that witness in appropriately strengthens the impact of the opinion on the mind of the Board. This might lead the Board to make an improper finding of fact. Thus the Board has applied a higher burden of admitting opinion planning evidence on a "planner" than on another "concerned citizen".

The Board felt Mr. Morgan's opinion might have "momentous and serious consequences" on the Board's mind. Those consequences could accrue unconsciously, leading the Board to erroneous findings since the opinions would not rest on legal base.

Mr. Morgan's sworn evidence is useful when dealing with matters of a factual nature. The Board totally disregards Mr. Morgan's opinions about the intent of the M.P.S. related to the decision of Council.

Given the Appellant's evidence, and the exclusion of some of Mr. Morgan's evidence, the Board has the written exhibits to help it. From those, it must determine the Municipality's views of the relationship between the intent of the M.P.S. and the decision of Council.

On the other hand, the Board sees nothing incongruous in accepting Mr. Morgan's opinions contained in a staff report to P.A.C. Valerie Spencer, Chief Planner, signed the Staff Report. The Staff Report resides in a "Municipal Booklet" which, in Board practice, appears on most planning appeals. It forms part of the record before P.A.C. and Council. Council and P.A.C. use the Staff Report in their deliberations. It is part of their record. No one objected to admitting the Staff Report.

Proceedings under the Planning Act are "Appeals". They are not hearings "de novo". Thus the Board must review the record and may, in appropriate circumstances, rely on it.

In this appeal, the Appellant at the hearing raised no planning evidence to support his grounds of appeal.

The Board has the duty to determine whether or not the decision of Council reasonably conformed to the intent of the M.P.S. By perusing the other evidence, which included the record, the Board made its determination.

Many of the neighbours in the Lakeside, Beechville and Timberlea opposed this application at the Council level. They attended Council and, according to the Minutes, spoke there.

Some 150 people purporting to reside in the area signed a petition against this rezoning.

Many in the community attended the Board hearing both in the morning and afternoon sessions. Of those, only one, Mrs. Dorrington, spoke under oath to the Board. Nobody, other than the Appellant, dissented from her views.

The Planning Advisory Committee (P.A.C.) Minutes of April 25, 1988, contained many comments made in debate including comments of Councillor Lichter. The Board is aware that Councillor Lichter is an active member of the P.A.C. (as appeared from the Minutes) and the Board would like to quote from some of the comments he made there:

> "Councillor Lichter indicated that staff has to make recommendations based on planning principles. It is up to the Planning Advisory Committee and Council to take care of the public issue. He urged that staff continue to evaluate each and every application in a fair manner based on planning principles.
>
> Councillor Lichter said that he had to agree with Councillor Snow's comments. Approximately five - six years ago, Council heard that growth in the Timberlea/Lakeside/Beechville area is stagnant, and that it has a lot of potential for growth. A lot of money was spent in order to bring in water and sewer to the area. He noted that the plant is only now at 30% capacity, and said that someday the County will have the recoup the cost.
>
> Councillor Lichter pointed out that we have to operate under the terms of the existing plan and by-law. The individual has the right to come to a public hearing and defend his application.
>
> Councillor Lichter commented that if somebody purchases a property and then comes in with a rezoning application they are referred to as a speculator. He pointed out that if the recommendation is approved the Applicant will not have a chance to speak at a public hearing.

> Councillor Lichter commented that the "red herring" was created at the time when the need was heard and the public came in demanding that the sewer system be brought in. Everybody knew back then that it would be the Nine Mile River and that it would cost the taxpayer. He said that it was argued that this is an undeveloped area and the only way to get development is by having the system put in there."

A motion to dismiss the application at the P.A.C. without a public hearing, didn't pass (6-3). Another motion passed setting a date for public hearing for June 13, 1988 at 7:00 p.m. The staff report (April 11, 1988) was before the P.A.C. and before Council at the Public Hearing. Mr. Morgan prepared it. Mr. Meech, the Chief Administrative Officer of the County, and Valerie Spencer, the Director of Planning and Development, signed it. That report recommended the rejection of the rezoning. The analysis contained in their report is as follows:

> "The property is located within the Residential Designation of the municipal planning strategy for Timberlea/Lakeside/Beechville. The plan recognizes that the predominant housing type within the area is the single unit dwelling and states that it is the intention to preserve the established low density environment. However, the emerging need for alternative types of housing accommodation is acknowledged and, therefore, policies also state that an eventual mixture of housing is to be encouraged.
>
> ...
>
> Planning staff do, however, have several concerns about the potential impact of this proposal.
>
> Firstly in 1986, Council approved two separate rezoning applications to allow for multi-unit dwellings in the immediate vicinity. One was on a 2.0 acre lot abutting the applicant's property immediately to the east (shown as 78A-85 on Map 3) and the other was on a 4.3 acre lot to the west and on the north side of the

highway (78B-85). Neither parcel has been developed to date, but the land use by-law would permit up to 57 and 121 units on each of these lots, respectively. Furthermore, a commitment was made by the then applicant that site 78B-83 [sic] (Map 3, pg.) would be developed with three buildings. If the present application is approved, a total of five apartment buildings could be constructed in this area. Although the plan does not provide a precise definition, this potential number of apartment buildings begins to call into question the plan policy achieving a housing mixture which does not significantly jeopardize the low density residential environmnet [sic].

Secondly, given the fact that the previously zoned lots have yet to be developed, there has been no opportunity to evaluate the effects of multiple unit development in the area.

Furthermore, the lack of a specific development proposal for the subject property makes it impossible to evaluate it against stated plan policy that the development proposal be one of the items that is taken into account by Council in considering any application.

Finally, although the Department of Transportation has stated that the lot meets its site stopping requirements, the strategy also expresses community concerns about traffic flows along the Bay Road, presently serving as the only arterial link between communities in the plan area and Halifax. Because of the narrow road width, winding road configuration and large number of poorly defined access points, the efficiency and safety of the road could be threatened by increasing traffic levels. To allow for further development, the plan recommends that a collector road parallel to the Bay Road and a new interchange from the Bay Road to Highway No. 103 be constructed. Neither recommendation has been implemented at this point.

The sites previously approved for R-4 development, as well as numerous single unit dwellings all have frontage on a relatively narrow and winding stretch of the Bay Road. there is also an intersection across from the applicant's property. Vehicles turning onto these properties could cause significant delays to through traffic. Therefore, until the impact of the approved R-4 developments in [sic] known, and/or improvements are made to the road network, permission to allow another R-4 development in this immediate vicinity is considered to be premature."

The Minutes of the public hearing held on June 13, 1988, show that the staff report presented to Council remained unchanged. Mr. Eisenhauer gave his full story to the Council and answered many questions asked by various Councillors.

Mrs. Anne Fournier, a resident of Timberlea, spoke to Council against the rezoning. So did Helen Dorrington, a resident of Beechville (who also testified before the Board), the Reverend Dwayne Tanswell of St. Luke's Anglican Church and Catherine Pelrine of Timberlea. Council considered the Petition against rezoning.

Unanimously, members of Council rejected the rezoning application right at the public hearing. The Applicant appealed that decision to this Board.

Planning Act sections bearing directly on this appeal are Section 63(1)(1A) and (b); 63(3); 63(5); 63(7)(a) and (b).

The Board determines the evidence shows no reasons to invoke Sections 63(7)(a) or (b) in this appeal. There is no case of undue hardship made out. There are no extraordinary and compelling circumstances present.

The Board has a duty in this appeal to peruse the entire M.P.S. for Timberlea/Lakeside/Beechville. That is Exhibit E-7 and entitled "Municipal Development Plan for Timberlea/Lakeside/Beechville". The Board has done so.

Policy P-23 of the M.P.S. shows the intention of Council to preserve the existing single unit dwelling residential environment. Policy P-26 allows Council to consider low density residential developments which are on a scale and location not inconsistent with existing neighbourhoods. Policy P-26 allows for two-unit dwellings. Council, within the residential designation serviced by municipal central sewer and water services, may rezone to permit multiple unit dwellings. Policy P-33 also invokes Policy P-89. The above seem to be the policies that directly affect this particular application

Mr. Eisenhauer frankly stated that he had no specific proposal for the land. He wished the land rezoned to enhance its value. He then would be able to obtain a provident sale of the land.

The Board finds this frank admission refreshing. It is honest. The report of the planner presented to P.A.C. criticizes this type of approach. The Report says such an application prevents the planners from testing the proposal by the criteria in the M.P.S. The Board believes that such an application allows planners to test the "worst case scenario" of proposed rezonings against the M.P.S. criteria.

The planner says that, in this case, he has done so. The "worst" that can happen on this lot is the construction of a 35-foot high apartment building on 50% of the lot. The building would contain 27 residential apartment units.

The planner's objections set out in the report to the P.A.C. previously noted in this decision may be summarized as:

1. The cure of the traffic problem is the construction of an arterial road to relieve the

traffic.

2. The development was premature. The planners have not received experience from observing appropriate development of a previously approved (1986) still vacant R-4 area. The planners wish to hold further R-4 rezoning. They first wish to see the impact of the development of the already-approved R-4 on the environment of the community.

The Board viewed of the site. Existing trees and a height elevation would buffer the Munro subdivision from the proposed development.

On its view, the Board perceived the R-4 land between the subject land and the church requires no protection. This R-4 land is also on a higher elevation. The proposed rezoning would directly affect few small residential uses.

The Board has no concern with the effect this development might have on later developed R-1 land across the Bay Road.

If the Board's views prevailed and not the planners', the Board would not hesitate to recommend R-4 rezoning of this land. Based solely on its visual and cursory examination of the site, the rezoning looks good to the Board.

The function of the Board is not however to substitute its opinion for the decision of Council. The Board cannot substitute its subjective opinion for the advice to Council of the planners.

The Board's function is to peruse the evidence that is adduced before it. The Board determines (Section 63(3) and 63(5) **Planning Act**), whether the decision of Council reasonably fits the M.P.S.' intent.

Mr. Cragg, in support of this argument, has cited Truro v. Wallace, an unreported case of the Board, NSMB-601-87-P, decided by Vice-Chairman Garber. At page 13 and 14 of that unreported decision the Board says this:

> "The Board's role is not to impose its own view but to determine whether or not Council's decision was reasonably consistent with the intent of the M.P.S. While there are policies in the M.P.S. that encourage residential development, Council is not bound to grant all applications for rezoning for residential use. Council has a discretion which it must exercise reasonably in the context of the M.P.S. The Board is of the opinion that Council's decision is reasonably consistent with the intent of the M.P.S."

The Board adopts, as correct law, the reasons quoted from Vice-Chairman Garber's decision in Wallace.

The Board feels that Council had before it the direction of Policy P-23 to continue the low scale residential development.

The Board has some sympathy with the planner's views expressed in his report to the P.A.C. There he stated the Municipality had not yet felt the development impact of previously approved but undeveloped R-4 rezonings on the Municipality. The Board agrees the non-development of those rezoned areas might show there was little demand for R-4 housing. A lack of such demand would show that the present application was perhaps premature. The planners correctly recommended the postponement of further R-4 rezoning pending the completion of approved R-4 building. The postponement would allow the planners to test impact on the community of extensive R-4 construction.

Council had this indication of prematurity before it. It also had the policies of the M.P.S. before it. These policies support Council's decision.

There is no indication on the evidence that Council was unduly affected by the representations of citizens in the neighbourhood. The reasoning in the City of Sydney cases (setting out Council's duty not to respond to undue public pressure) does not apply.

To the Board, on its view of the site, this land appeared suitable for 27-unit apartments. The planners who reported to Council thought otherwise. Council agreed with those planners.

The Board will not substitute its feelings for the decision of Council properly arrived at within the intent of the M.P.S. Council especially relied on Policy P-23. The Board cannot say this was wrong.

Therefore the Board will dismiss the Appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 30th day of September, A.D., 1988.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD

THOMSON v. CITY OF HALIFAX

PLANNING - L.U.B. AMENDMENT - REFUSAL TO REZONE FROM R-2 TO C-2A - SPOT REZONING FOR LAW OFFICE - STAFF APPROVAL - GEN. FLUM-COMMERCIAL DESIGNATION - UNDUE HARDSHIP - EXTRAORDINARY AND COMPELLING CIRCUMSTANCES - PLANNING ACT S.S. 63(7).

T, a lawyer, applied to have his property rezoned from R-2 to C-2A to accommodate his law office. If the property was in the commercial designation on the Gen. FLUM, Council could permit such rezoning. Both T and the Planner thought this was the case as they worked from an erroneous Gen. FLUM. Staff recommended the rezoning. P.A.C. sent the rezoning application to Council without recommendation. Council held public hearings on the rezoning application, neighbours objected to the rezoning, Council decided to turn down the rezoning. At the Board's hearing a preliminary issue was raised. The error in the Gen. FLUM was proven and the real Gen. FLUM was produced as certified by the Minister. The property was not within the commercial designation on the Gen. FLUM. T had not renewed his lease on his old premises. He had notified his law clients of the removal of his office. He had changed his telephone listings. He argued that the error had caused him undue hardship or that it constituted unusual or exceptional circumstances empowering the Board to grant relief by ordering Council to rezone.

HELD: The Board dismissed the appeal.

The Gen. FLUM did not designate the property as commercial and therefore the decision of Council to refuse the rezoning reasonably fell within the intent of the M.P.S.

T knew and assumed the risk that this application could fail. The facts proven by him did not amount to undue hardship. The common misapprehension concerning the Gen. FLUM does not constitute extraordinary and compelling circumstances. Council did not use the common error as a basis to reject his application because Council was under the same misapprehension. The Board was not prepared to find his application would have succeeded at the Board level if the error had not come to light. Making a determination under Section 63(7) the Board could consider opposition of the residents to the application. Such consideration could nullify the affects of Section 63(7). The Board found it appropriate in this case to give weight to the objections of the residents. The facts proven did not extend to extraordinary and compelling circumstances.

NSMB-18-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S. 1983, c. 9, by **WILLIAM P. THOMSON** from a decision of the Council of the **CITY OF HALIFAX** made the 28th day of July, 1988, which decision refused to rezone 6422 Chebucto Road from General Residential (R-2) Zone to Minor Commercial (C-2A) Zone.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: ROSS STINSON, LL.B., and GILLIAN ALLEN, LL.B., on behalf of the Appellant;

BARRY ALLEN, LL.B., GERRY GONEAU, LL.B., and NADINE SMILEY, Articled Clerk, on behalf of the City of Halifax;

PATRICK CONNORS, on behalf of himself and other Interested Persons.

HEARING DATES: September 16, 1988;
September 26, 1988.

DECISION DATE: October 3, 1988.

DECISION: Appeal Dismissed.

DECISION

The Appellant, **WILLIAM P. THOMSON** owns a law practice in the City of Halifax. Two associates practice with him. The Appellant rents office space for his practice in the Rothman's Building on Dutch Village Road. The lease will expire on October 31, 1988.

Mr. Thomson decided to purchase a building to house his law practice. He looked at a number of properties, most of which were not zoned for office use. Mr. Thomson at various times discussed with the City Planning Staff the likelihood of success in a rezoning application. He decided that the subject property, 6422 Chebucto Road, would be an excellent site for his law office. He applied to rezone that property from General Residential (R-2) Zone to Minor Commercial (C-2A) Zone.

The subject property is described in the Staff Report prepared for Council as follows:

> "The site is located on the southern side of Chebucto Road between Kline and Oxford Streets. The lot, which has approximately 53 feet of frontage on Chebucto Road, is approximately 5,275 square feet in area. The existing building is a two-storey single family dwelling. A small garage is located near the rear lot line.
>
> The site is bounded by a single-unit dwelling on the east and an antique store and two single-unit dwellings on the west and a duplex to the rear.
>
> Properties fronting on Chebucto Road and North Street are occupied by a mix of uses. The predominant land use along these streets in the area shown on Sketch No. 1 is residential. However, there are existing commercial uses on both the intersections of Oxford and Kline Streets with Chebucto Road. Other uses include Oxford Street School and a church. One block to the west of the site is a substantial area of existing C-2A zoning. Uses in this area are largely commercial in nature, ranging from convenience stores and laudromats to real estate and insurance offices as well as take-out food services all serving both the surrounding neighbourhood and passing traffic."

The Appellant proposes to renovate the house into a law office with at least 6 on-site parking spaces. There is no street parking immediately adjacent to the property. Mr.

Thomson believes there is additional parking available on side streets.

According to the Staff Report, the subject property lay within the "Commercial Designation" on the Generalized Future Land Use Map ("Gen. FLUM"), a part of the Municipal Planning Strategy ("M.P.S.") adopted by the City. Staff recommended approval of the rezoning application.

The Planning Advisory Committee ("P.A.C.") reviewed the application and forwarded it to Council without recommendation. City Council, requested a further staff report "addressing the fact that the area in question is designated "Commercial" on the Generalized Future Land Use Map, but is primarily used for residential R-2 purposes". The supplementary staff report briefly outlined a 1979 Zoning Review and a 1982 C-2 Zoning Review concluding that the commercial designation had been maintained. It further concluded that Council had not directed P.A.C. to review the designation.

Council held a public hearing. One local resident spoke in opposition to the proposed rezoning. Council received two opposing letters from residents. At the July 28, 1988 meeting, Council rejected the application on a motion brought by Alderman Meagher who represents the Ward in which the subject property is located.

The Appellant filed a Notice of Appeal with the Board on August 3, 1988. The Board set the hearing for September 16, 1988. On that date the Appellant requested that the Board make a preliminary ruling with respect to evidence that had just come to light. The evidence concerned whether or not the subject property was within the Commercial designation on the Gen. FLUM.

Counsel for the City produced the original Gen. FLUM which is contained in the official copy of the M.P.S., approved by the Minister of Municipal Affairs. An examination of this map showed that the area which was designated "Commercial" did not include the subject property. The copy of the Gen. FLUM which had been relied on by City Staff and by the Appellant included the subject property within the Commercial designation.

The Board ruled that the Gen. FLUM included in the M.P.S. approved by the Minister was the official map. The Board adjourned the hearing to permit further inquiries concerning any subsequent amendments to the Gen. FLUM.

The Board reconvened on September 26, 1988. There were no amendments to the Gen. FLUM affecting the subject property. The subject property is not within the commercial designation on the Gen FLUM.

It is clear from the new evidence that Council's decision to reject the application to rezone reasonably carries out the intent of the Municipal Planning Strategy. The Board will not review Council's decision further.

Section 63(7) of the Planning Act which as follows:

> "(7) Notwithstanding subsections (5) and (6), the Board may allow an appeal by an applicant if, in the opinion of the Board,
>
> a) the applicant would suffer undue hardship; or

b) extraordinary and compelling circumstances are present."

The Appellant asks the Board to find that Council's decision causes him undue hardship or that extraordinary and compelling circumstances are present. He says the following factors support his position:

1) The subject property is such a good location that he planned to practice law there until his retirement.

2) The Appellant convinced another lawyer to practice with him because the Appellant would own the office building. This lawyer may leave if the rezoning fails.

3) The location on a principle street would generate more law clients. People driving by would see the sign. Without the rezoning, he will lose that business.

4) The Appellant has advised his clients of the intended move. He has changed his office phone number. If the rezoning is not granted, it will be costly to advise clients of another location. His office phone number will likely have to be changed and clients may be lost as a result.

5) The Appellant convinced himself that the M.P.S. permitted the rezoning. He relied on the City Staff recommendation that said the M.P.S. permitted the rezoning.

6) If the Board doesn't permit the rezoning he will

forfeit the deposit on his agreement to buy the subject property.

7) He was entitled to rely on the copy of the Gen. FLUM that was distributed.

8) The Appellant must vacate his present premises by October 31, 1988. He has been unable to find a suitable alternative location.

The City argues there are no extraordinary and compelling circumstances and that the Appellant has not suffered undue hardship.

Patrick Connors, representing himself and some other residents, is firmly opposed to the rezoning.

The Board has from time to time dealt with Section 63(7). To date, it has never allowed an appeal based on that Section. It is clearly meant for exceptional cases. It cannot be used on a routine basis to avoid the intent of the M.P.S.

Do the facts in this case warrant the Board exercising its power to approve a rezoning not supported by the M.P.S.? The Appellant is a lawyer and the Board must assume he knew the risk involved in making financial arrangements which depend on the positive ruling of a decision-making body. The facts support the assumption. He did make the agreement of purchase and sale contingent on the outcome of Council's decision. The Minutes of the Public Hearing show that the Appellant stated to Council that he had an agreement of purchase and sale on another property which was zoned C-2A. The Appellant knew his rezoning application could fail. He made provisions for that contingency.

Changing his telephone number and advising his clients of his intended change of address are risks that the Appellant assumed. They do not warrant a finding of undue hardship. Business may increase if his office is located on Chebucto Road. The Board sees no difference in the Appellant's plight from that of other persons who seek a commercial rezoning and are unsuccessful.

The Appellant convinced himself that he would succeed at Council. When he did not, he felt he would succeed before the Board. He apparently failed to consider fully that the local alderman and some residents were opposed to his application.

Mr. Thomson also seemed unaware that Council has a discretion whether or not to rezone. Council need not accept the recommendations of staff. The Board held in Busche et al v. Mahone Bay (June 8, 1988) NSMB-7-88-P (unreported) that the fact that a property is designated commercial on the Gen. FLUM does not mean that Council should automatically zone it commercial upon application.

Does the fact that everyone was operating under the assumption that the subject property was designated Commercial mean there are such extraordinary and compelling circumstances that the Board should permit the appeal? The Board believes not. The fact that the Gen. FLUM on which the Appellant relied was incorrect was not the basis on which his application was rejected by Council. Mr. Thomson assumed he would succeed at Council. He acted on that assumption. Council refused his application. The Board is not prepared to find that the Appellant would have been successful at the Board level if the error had not come to light. Exhibits T-10 and T-11, the 1979 Zoning Review and the 1982 Zoning Review of the area, show Council wished to maintain a residential status in the neighbourhood by restricting commercial zones to existing commercial uses.

In making a determination under Section 63(7), the Board considered the opposition of residents to this rezoning. The Board agrees with the comments of the Appellant's counsel that consideration of residents' opposition could nullify the effect of Section 63(7). The Board finds it is appropriate in this case to give weight to the objections of the residents.

The Board finds that the Appellant has not suffered undue hardship and there are not extraordinary and compelling circumstances present. The Board dismisses the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 3rd day of October, A.D., 1988.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

BEZANSON v. WARDEN

PLANNING - REFUSAL OF SUBDIVISION APPROVAL - AGRICULTURAL ZONE- L.U.B. AND M.P.S. AMENDMENT SINCE LAST LOT APPROVAL - MUNICIPAL BOARD ACT S.S. 16(1); PLANNING ACT S.S. 96(1); 96(2); 96(3); 96(5); 103; 103(5); 103(3); 76(4); 76(5); 110.

B's were subdividing their farm land, over a period of several years into residential lots. After B's last subdivision approval and before this application for approval, the Municipality amended its M.P.S. and L.U.B. to change the designation of the property from forestry to farm. This prohibited the subdivision for residential purposes of B's land. B applied to W, Development Officer, for a subdivision approval. W never notified B whether or not the application was complete. Within fifteen days of the application, W turned down B's application to subdivide. B then appealed to the Board. B alleged tentative approval of the lots in question but evidence showed the application for tentative approval withdrawn before tentative approval granted. In any event, any tentative approval would have expired before B made this application for final subdivision.

HELD: The Board dismissed the appeal and confirmed the decision of the Development Officer.

The M.P.S. and L.U.B. amendments affectively prevented subdivision for residential purposes of B's land.

The Development Officer had a clear duty to review the application and inform the applicants within 15 days of its state of completeness. He had another duty within 30 days to deal with any completed application. Until the time of the Board hearing, he had never notified the applicants whether or not their application was complete. At the Board hearing he testified that the application was technically complete in all respects. Strict compliance with the Act requires the Development Officer to notify the applicants of the degree of completeness of the application and failure to do so may constitute an offence under the Planning Act.

Regardless, the refusal satisfies the Board that B's application was complete and was refused within 30 days of its receipt by W. The Board could not order subdivision approval since it is clearly contrary to the intent of the Land Use By-law as amended.

NOTE: THERE IS A REFERENCE IN THE DECISION TO SECTION 92(3) OF THE PLANNING ACT. THIS MUST BE ERRONEOUS. THE TEXT THAT IS ENCLOSED IN THE DECISION IS THAT OF 96(3).

NSMB-17-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S., 1983, c. 9, by **RUSSELL** and **SHEILA BEZANSON** from a decision of **JOHN WARDEN, DEVELOPMENT OFFICER**, for the Municipality of the County of Kings made on June 22, 1988, refusing to approve a subdivision of lands on Green Road, Brooklyn Street, County of Kings, into Lots RB-14 and RB-15.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: RUSSELL BEZANSON and SHEILA BEZANSON, Appellants on their own behalf;

JAMES E. DEWAR, LL.B., on behalf of the Municipality of the County of Kings.

HEARING DATE: September 27, 1988.

DECISION DATE: October 7, 1988.

DECISION: Appeal Dismissed.

DECISION

This is an appeal under the **Planning Act**, S.N.S., 1983, c. 9. **RUSSELL** and **SHEILA BEZANSON** appeal a decision of **JOHN WARDEN** Development Officer of the Municipality of the County of Kings. According to the Notice of Appeal Mr. Warden made the apparent decision on June 14, 1988. Mr. Warden's decision refused the Bezansons' application to approve a subdivision of the lands which they occupy into Lots RB-14 and RB-15.

Under Section 16(1), c. 9, S.N.S. 1981, the **Municipal**

Board Act, the Chairman assigned Board Member Richard Weldon to determine this appeal.

The Board heard this appeal at the 10:00 a.m. September 27th sittings, Council Chambers, Municipality of the County of Kings, Kentville. The Board, after the evidence and the lunch adjournment, viewed the site. It then reconvened the hearing to hear argument.

The Board received the Notice of Appeal on July 4, 1988. Mr. and Mrs. Bezanson sent a letter along with the original Notice of Appeal.

Linda Garber, Vice-Chairman, on July 5, 1988, instructed the Bezansons to file an Amended Notice of Appeal. She also wrote the Appellants to file an undertaking to pay the advertising costs of the Notice of Hearing. She requested that they file the Amended Notice of Hearing by July 25, 1988.

The Bezansons filed an Amended Notice of Appeal and undertaking with the Board on July 18, 1988.

The Amended Notice of Appeal complains of the decision of John Warden, Development Officer, of June 22, 1988. (The original Notice of Appeal refers to a decision on June 14, 1988).

The Amended Notice of Appeal says as follows:

> "The grounds for appeal are:
>
> (1) We had received a tentative approval of the lands sought to be sub-divided by virtue of various conversations with the Municipal Planning Office for the County of Kings, and in particular, our receipt for the payment of the subdivision fee indicates that our Application was part of a previously approved Subdivision Number 87273.

(2) We were assessed Residential Property Taxes on the lands in question for 1988.

(3) We had received verbal assurances on at least two (2) occasions from the Municipal Planning Office at the County of Kings that the lands in question would not be subject to the new By-law that allegedly will not now permit a subdivision of our lands.

(4) We received no notice of any proposed change to the By-laws that would affect the property in question, as other Developers in the County had apparently received written Notice from the Municipality as a result of the proposed change to the Municipal By-laws.

(5) Such other grounds as may appear at the hearing."

The Board goes back to the timeliness of the Notice of Appeal. It notes the date contained in the original Notice of Appeal. If the date of delivery of the decision to the Appellant were that date, this appeal is out of time. The Board would have no jurisdiction to hear the appeal on its merits.

The Board, however, refers to the Amended Notice of Appeal which gives the decision date of June 22, 1988. It is clear from the face of the document that the Appellants made their application June 14, 1988. It is also clear that Mr. Warden's signed his rejection letter June 22, 1988. He delivered it on June 22nd or some later date before the start of the appeal. The Board therefore finds that regardless of the text of the Notice of Appeal, the appeal was timely unto the Board.

The Board satisfied itself the Appellants had met all procedural requirements necessary to support jurisdiction of the Board. The Municipality consented to the Board's jurisdiction to hear this appeal on its merits.

Russell and Sheila Bezanson occupy a farm property on the northerly side of Brooklyn Street, Municipality of the County of Kings. The Nova Scotia Farm Loan Board owns the property. They have applied to have two lots subdivided on Brooklyn Street, each lot being about 40,000 square feet in area.

Exhibit B-9 "Appeal Record" includes Plan 9 being the plan of the proposed subdivision. The two one-acre lots applied for lie to the east portion of this plan. They front on the north side of Brooklyn Street. They are unexceptional in that they are 200 feet frontage and 200 feet in depth. To their rear lies vacant land, clearly in farm use. To their west fronting along Brooklyn Street roughly 200 feet deep lie five lots previously subdivided from the same land block. Lot, RB-8, on Green road, one lot deep from Brooklyn Street, also previously received approval. These lots encompass residential construction.

On the other side of the Brooklyn Street, opposite the subject lots, there is other land obviously in farm use.

Mr. Bezanson testified, Mrs. Bezanson did not. The witnesses for the Municipality and/or John Warden, called by Mr. Dewar, were John Warden, Gerald Murphy and Robert Elliott.

Mr. Bezanson testified that, in 1985 they had applied for tentative approval of all of the lots outlined on Exhibit 9, P. 9. The Appellants withdrew the tentative approval application before receiving tentative approval.

Mr. Bezanson then proceeded over time to obtain final approval of lots RB-8, RB-7, RB-9, RB-10, RB-11, and RB-12. The latest approval was of lot RB-13.

Mr. Bezanson paid some $1,400.00 for the staking of lots RB-14 and 15 and the approval application to Mr. Warden. He sees no reason why Mr. Warden should not approve these lots like the other lots.

Mr. Bezanson said he had never received a certificate that any of his approval applications were complete. From time to time, he has received final approval of lots.

Mr. Bezanson called no evidence to support ground of appeal number (3) in his Amended Notice of Appeal. No evidence supported ground of appeal number (4). Ground of appeal number (3) raises issues of promissory estoppel. Since there is no evidence to support this ground of appeal, the Board will not consider it further.

Mr. Warden testified that he had received the application to approve lots RB-14 and RB-15. Mr. Warden said that he found that the lots were within a zone of agricultural land which forbids non-farming residential construction.

Mr. Warden testified that Mr. Bezanson had applied for that type of construction. He agreed that the lots in all other technical aspects followed the subdivision regulations then and now in force in the Municipality. Mr. Warden said after the approval of lot RB-13 and before the refusal to approve RB-14 and RB-15, Council amended the M.P.S. It also amended the L.U.B.

and all necessary subdivision rules and regulations. As a result of these changes, the farm land in question changed zoning from "forestry" to "farm". This rezoning prohibited development of farm land for non-farm residential development.

Mr. Warden went on to say that, even if he approved the lots for subdivision, no one could build on them. Under the building regulations involved he would also refuse a building permit.

Gerald Murphy, Director of Planning for the Municipality, testified about the history of the M.D.P. and M.P.S. for the Municipality. He said that Council found the original M.D.P. and consequent L.U.B. allowed for too much use of good farmlands for residential construction.

Mr. Murphy said, to protect farmlands against residential encroachment, the Council had more finely defined the regulation of farm land use. Council consciously restricted residential development of good farm land.

Council changed the subject property's zoning from "forestry" to "farm" a month or two before Mr. Bezanson applied for his present approval.

Mr. Dewar qualified neither of these last two witnesses as experts in the planning field.

Mr. Robert Elliott, a senior assessor, testified he had assessed lots RB-14 and RB-15 in error as residential properties. When the Municipality notified him of his error, he corrected the error on the assessment roll.

The facts of this case are not really in dispute.

The Board recites pertinent sections of the **Planning Act** which apply to subdivision approval by a Development Officer for an applicant. These sections govern the appeal and the powers of the Board that flow from that refusal decision.

Section 96(1) of the **Planning Act** says:

> "An application for approval of a plan or instrument of subdivision shall be made to the development officer."

The applicant applied for approval on June 14, 1988. No one has questioned the validity of that application.

Section 96(2) of the **Planning Act** says:

> "Within fifteen days of receiving an application pursuant to subsection (1), the development officer shall inform the applicant whether his application is complete."

The Development Officer admitted he never informed the applicant about the completeness or incompleteness of his application in so many words. The Development Officer took the position that the refusal made within fifteen days was an implied completion certificate.

Subsection (3) of Section 96 of the **Planning Act** says:

> "Within thirty days of receiving a completed application, the development officer shall
>
> a) approve the plan or instrument if it
>
> i) conforms to the subdivision regulations or regulations or by-laws, and
>
> ii has received all approvals, if any, of departments or agencies of the Province or of the municipality or any agency thereof in addition to those set out in the regulations or by-law, as the case may be;

> b) notify the applicant in writing of all approvals received and, where necessary, departments or agencies of the Province which have not approved the plan or instrument as submitted, where such approval is required; or
>
> c) notify the applicant in writing of his decision refusing to approve the plan or instrument as submitted, which decision shall contain the reasons for the refusal."

Since allegations of tentative approval exist in the evidence, the Board also quotes Section 96(5).

> "Approval of the lots shown on a tentative plan of subdivision lapses if the lots are not shown on a final plan of subdivision approved within two years of the date of the approval of the tentative plan."

An applicant may appeal to the Board a decision of a development officer refusing subdivision approval.

Section 103 of the **Planning Act** governs appeals to the Board and states:

> "(1) Where a development officer refuses to approve a plan or an instrument of subdivision, the applicant therefor may appeal the decision to the Board.
>
> (2) An appeal pursuant to subsection (1) shall be filed with the Board within fifteen days after the written decision of the development officer is served on the applicant.
>
> (3) In considering an appeal pursuant to this Section, the Board shall determine whether the proposed plan, or instrument of subdivision complies with the subdivision regulations or subdivision by-law, as the case may be."
>
> (4) The Board shall
>
> a) confirm the decision of the development officer, or
>
> b) allow the appeal by directing the development officer to approve the plan or instrument of subdivision.
>
> (5) Where and only where the plan or instrument of

> subdivision is in accordance with the subdivision regulations or the subdivision by-law, whichever is applicable, the Board shall allow the appeal."

The Board finds the existing subdivision regulations, when the applicants applied for subdivision, prohibited residential subdivision in this area of the Municipality.

Therefore, under Section 103(5) of the **Planning Act**, the Board cannot order that Mr. Warden grant the subdivision approval.

Under Section 103(3) the Board also determines that the proposed subdivision does not, for reasons above stated, follow the subdivision regulations.

The question arises has there ever been a valid decision of the development officer refusing this application to subdivide these two lots? In this context "valid decision" means a decision the Board may review. The Board sees this the only remaining issue before the Board.

The evidence is clear that, in a grammatical sense, the development officer has refused the application to subdivide.

It is also clear in a grammatical sense the Development Officer has never certified to the applicants the completeness of their application.

Mr. Justice Chipman in the unreported case of Smith's Field Manor Development Limited v. The City of Halifax, S.C.A. No. 01837, dealt with the duties of a development officer under the **Planning Act** in processing a development permit application in Halifax.

Section 76 of the **Planning Act** deals with the application for a development permit. At page 2 of Mr. Justice Chipman's decision he quotes subsections (4) and (5) of that Section. These subsections very closely compare with subsections (2) and (3) of Section 96 of the **Planning Act** which apply in this case. The Board will quote the subsections (4) and (5) of Section 77 of the **Planning Act** set out in Justice Chipman's decision:

> "(4) Within fifteen days of receiving an application for a municipal development permit, the municipal development officer shall inform the applicant whether or not his application is complete.
>
> (5) Within thirty days of receiving a completed application, the municipal development officer shall either grant the municipal development permit or inform the applicant of the reasons for not granting the permit."

In that case, the Halifax Development Officer followed a somewhat different practice than these subsections prescribed. In practice, the City did not grant development permits before the application for building permits. According to Mr. Justice Chipman at page 4 of his decision:

> "This practice was not in accordance with the course prescribed by s. 77(4) and (5) of the **Planning Act**".

At page 10 of that decision Mr. Justice Chipman went on to say:

> "...its building permit request was refused because City Council ...advertised its intention to consider amendments to the R-2A zone which if passed would place greater restrictions on developments within the zone. Since the proposed project would not meet these new restrictions a development permit would not be issued. This it will be noted was an outright refusal of the permit even though s. 76(7) if applicable provided that

> it should not be issued for a period of 120 days from the publication of the first notice of intention to amend."
>
> At page 13 of this decision:
>
> "It is understandable that the appellant acquiesced in the City's improper procedure and attempted to comply with all the requirements of the City.
>
> ...A review of the correspondence makes it clear that had the City followed the **Planning Act** the municipal development permit would in all probability have been granted by March 18, 1987 ...".
>
> At page 14 of this decision:
>
> "It is also clear that the application was complete in every respect, no objection having been taken by the City that it was incomplete."
>
> At page 18 of this decision:
>
> "By that time the appellant was clearly entitled to its municipal development permit. Its right to the permit was thus vested."
>
> At page 23 of this decision:
>
> "That right would have to be asserted by mandamus and the inconvenience and undesirability of two separate proceedings are obvious. Moreover the provisions of the Planning Act appear to be most appropriate for the assertion of an appeal upon planning principles from the decision of the development officer. Such an appeal is not equally convenient, beneficial and appropriate as mandamus where, as here, there was a clear failure of the development officer to do his duty."

The Board has carefully reviewed the Smith's Field case. The Board believes there are distinguishing factors between the Smith's Field case and the case it now hears on appeal.

In Smith's Field, the development officer's failure to fulfill his duty under the **Planning Act** delayed the developer from exercising its rights. Halifax should have issued it a development permit when it was due.

In this case, it was clear that Mr. Warden's refusal (perhaps premature) clearly set out to the Appellant the refusal decision. He made his refusal within the fifteen days time limit for certification.

Strict compliance with the **Planning Act** requires the development officer to inform the Applicant within fifteen days whether his application is complete. Within thirty days of receiving a completed application the development officer must act under Section 96(3) of the **Planning Act.** Within that time he must deal with the subdivision plan either by approving it or rejecting it with reasons.

On receipt of the refusal, the applicants took their summary remedy under the **Planning Act** to appeal to the Board.

In this case, the development officer did not make any delay that injured the applicant.

Mr. Warden, and in argument Mr. Dewar, contended that this refusal, within fifteen days impliedly certified the application's completeness.

This is a commonsense interpretation. In the event, evidence satisfies the Board the application is complete.

Smith's Field requires strict compliance with Section 96(2) by the development officer. The Development Officer may not have notified the Applicants whether their application was complete. If he so failed, he may have committed an offence under Section 110 of the **Planning Act**. That issue is not before the Board.

Mr. Dewar argued the Board was powerless to act other than under Sections 103(3), (4), (5).

The Board has already dealt with Section 103(3) and (5) in this decision. Section 103(4), according to Mr. Dewar, allows the Board two alternatives. It may confirm the decision of the development officer. It may allow the appeal by directing the development officer to approve the plan or instrument of subdivision. Mr. Dewar says it has no further powers.

The Board finds the following:

1. That the Applicants made a valid application to subdivide.

2. That the Development Officer did not specifically inform the Appellants their application was complete. His time so to do expired.

3. That the Development Officer refused a completed subdivision application.

4. That decision came before the Board on appeal.

The Board cannot, on the evidence, allow the appeal. It could not have ordered the Development Officer to approve the subdivision. The evidence before the Board shows that the application for subdivision was for a purpose contrary to the subdivision regulations and by-laws.

The Board decided that the Appellants could not receive subdivision approval under the current zoning.

In view of Smith's Field, the Board notes that development officers must follow strictly the procedures set in the **Planning Act**.

The Board will grant an Order dismissing the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 7th day of October, A.D., 1988.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

MILLER v. TOWN OF TRURO

PLANNING - L.U.B. AMENDMENT - REFUSAL TO REZONE R-2 TO R-3-BASEMENT APARTMENTS - TRAFFIC - MUNICIPAL BOARD ACT S.S. 16(1); PLANNING ACT S.S. 63(1)(b); 63(4); 63(5); 63(7); TRURO M.P.S. POLICIES 501(b)(ii); 202(b).

K.M. and S.M., brothers, applied to rezone their side-by-side duplex on Curtis Drive from R-2 (Double Family) to R-3 (Medium Density) to make 2 basement apartments. This duplex lot had an outdoor heated pool. In order to accommodate the parking required for four units on the lot the pool would have to be filled in and used for parking. T's planner recommended to P.A.C. approval of this rezoning. P.A.C. recommended to Council to turn down the rezoning. Council decided to refuse the rezoning. All parties agreed there was a traffic problem.

HELD: The Board dismissed the appeal and confirmed the decision of Council.

The "worst case scenario" would allow 9 apartments. The proposal was for four residential units. Buildings already on the lot were of such a value that economics militated against the worst case scenario. Section 63(7) of the Planning Act did not apply, there was no undue hardship or unusual or compelling circumstances.

The Board felt two basement apartments would not alter the general composition of the neighbourhood. It is not the opinion of the Board from a view alone that prevails. The Board must consider the whole of the evidence before it. It must then determine whether the decision of Council reasonably conforms to the intent of the M.P.S. Council had genuine traffic concerns. Under the M.P.S. Council dealt with these concerns. The Board must therefore find that the decision of Council fell within the intent of the M.P.S.

NSMB-19-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S., 1983, C. 9, by **KIRK MILLER** and **SANDY MILLER**, from a decision of the Council of the **TOWN OF TRURO** made August 1, 1988, refusing to amend the Municipality's Land Use By-law by rezoning property located at 41-43 Curtis Drive, Truro, Nova Scotia.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: JAMES MacMILLAN, LL.B., on behalf of the Appellants, **KIRK MILLER** and **SANDY MILLER**;

DAVID W. GRUCHY, Q.C., on behalf of the **TOWN OF TRURO.**

HEARING DATE: October 6, 1988.

DECISION DATE: October 19, 1988.

DECISION: **Appeal Dismissed.**

DECISION

This is an appeal under the **Planning Act**, S.N.S., 1983, c. 9. **KIRK MILLER** and **SANDY MILLER**, brothers, appealed the August 1, 1988, decision of the Council of the Town of Truro. The Appellants had applied to rezone 41-43 Curtis Drive, Truro, from R-2 (Double Family) Zone to R-3 (Medium Density) Zone.

Under Section 16(1), C. 9, S.N.S. 1981, the **Municipal Board Act**, the Chairman assigned Board Member, Richard Weldon, to determine this appeal.

The Board heard this appeal at its 9:30 a.m. October

6th, 1988, sittings, held in the Council Chambers, Truro. After the hearing, the Board reserved its decision and adjourned to view the site.

The Board received the Notice of Appeal on August 5, 1988.

On August 8, 1988, Doreen Friis, Clerk, instructed the Appellants to file an Amended Notice of Appeal. She requested they file the Amended Notice of Appeal by August 22, 1988. The Millers filed an Amended Notice of Appeal with the Board on August 12, 1988. The Amended Notice of appeal says in part:

> "The grounds for this Appeal are:
>
> The refusal by Council to amend the zoning adversely affects the value and the reasonable enjoyment of the property. The reason given for the decision was that to grant the amendment would adversely affect the traffic from Curtis Drive onto Glenwood Drive. There are a number of apartment buildings on Curtis Drive including a row of four apartment buildings neighbouring 41-43 Curtis Drive. The increase in traffic from the addition of two apartment units would be minimal and insignificant."

The Town consented to the Board's jurisdiction to hear this appeal on its merits. The Board satisfied itself that the Appellants had met all procedural requirements necessary to support the jurisdiction of the Board.

Kirk and Sandy Miller own and occupy a duplex property on the east side of Curtis Drive in Truro, Civic Nos. 41-43. They have applied to have the duplex lot rezoned from R-2 to R-3 (Medium Density) zone.

Curtis Drive is a residential street in a newer area of Truro. It runs on to Glenwood Avenue on the north and to Upham

Street on the south.

Residential lots border both sides of Curtis Drive. Residential development borders all of Curtis Drive north of the subject property. It also borders much of the land to the south. Nearer Upham Street, Curtis Drive lacks residential construction.

The lot to be rezoned is approximately 100 feet by 300 feet and contains a large semi-detached structure. The building itself has a front lawn with two gravel driveways on the north and south boundaries. The rear yard, fully behind the building, contains an in-ground swimming pool. The Appellants have landscaped part of the lot. The building itself looks like a long, low bungalow with the front of the building running parallel to the street.

As currently developed, Curtis Drive is approximately 34% in medium density construction. The rest of the street's development is less than medium density construction although it contains some duplexes.

Mr. MacMillan for the Appellants called Sandy Miller and Peter Nelson. Mr. Gruchy for the Town called Police Chief Murray. Members of the public who testified on their own behalf were Marion Ann Waller, Lois Seel, Councillor Vince Roberts and John Hasiuk.

Sandy Miller, the owner and occupier of one side of the duplex said that the owners were applying to rezone the lot. He said the purpose of the rezoning was to allow construction of a two-bedroom basement apartment under each duplex.

Mr. Miller said that they were going to build one unit immediately upon rezoning and one, perhaps, in the future. Thus the lot which now contains two living units would have three immediately and four eventually.

The Millers propose to use these duplexes to house their itinerant labourers. They say they hire workmen for their construction business and provide them, as part of their benefits, with bed and board. Mr. Miller felt that it would be cheaper for them to provide accommodation for their help in this building.

Only if the Millers demolished the present building could they build a maximum of nine units under the proposed rezoning.

Mr. Miller gave an analysis of the mixture of zonings on the developed portions of Curtis Drive. The Board will not comment on his statement of mixture here. The Board notes that Mr. Miller's analysis agrees with the planning report of Peter Nelson.

Mr. Miller described his usual route of travel to and from his home to downtown Truro. He said he usually proceeded north to Glenwood.

Mr. Miller said there were traffic troubles at this intersection. If he turned right, the telephone pole, holding the yield sign facing north bound Curtis Drive traffic, obscures view to the right. On a right turn onto Glenwood Avenue, he sometimes has to accelerate unduly. Traffic on Glenwood comes rapidly from his rear and out of sight around a blind corner to the west of the intersection.

On a left turn coming out of Curtis Drive onto Glenwood, the line of vision to the west is about 150 feet. This is very short.

Mr. Miller said that the traffic problems in this area do not give Council enough reasons to turn down this rezoning application. Mr. Miller said the extra traffic potentially generated by their two additional units would not unduly exacerbate the area traffic problems.

Mr. Miller said that his duplex building was too new to tear down and to allow the nine unit "worst case" scenerio.

Sandy Miller said that his 12-unit apartment on the adjacent lot was too new to tear down also. He could not join the adjacent lot and the subject lot to support a higher density development on the consolidated R-3 lot.

He said that neither of these options were economically feasible.

The Appellants called Peter Nelson, Planner for the Town, to give evidence for them.

On motion, the Board qualified Mr. Nelson to give opinion evidence in matters of planning as they affect Truro.

On May 31, 1988, Mr. Nelson prepared a planning report on this rezoning. He presented this report to the Planning Advisory Committee ("P.A.C.") of the Town of Truro. This planning report proceeded through P.A.C. and was before Council.

Pertinent parts of Mr. Nelson's report are as follows:

"Operative Policy

This application involves a property which is located within a future low density residential areas as designated by the Municipal Planning Strategy on the future land use map, and as such is not situated in a location which would encourage this request. However, Policy 202(b) may be considered by Council (see appendix 2, overhead).

Site and Area Description

this lot is approximately 100' x 130' and contains a large semi-detached structure and in ground swimming pool.

Land uses within proximity to this application are to be carefully considered in light of Policy 202(b). Appendix 2 provided clearly indicates this area is a very mixed density from single family dwellings to twelve unity [sic] apartment buildings, of [sic] of the properties identified:

11 are in excess of 3 units
14 are single family dwellings
3 are two units
2 are unknown or vacant
2 are institutional

32 total (see appendix 3)

Evaluation indicates that 34 percent of these lands are now medium density. The special distribution of these uses likely does affect the potential for continued homeowner single family uses of many of these properties; however, the subdivided lots are commensurate with low density residential uses. This would indicate that the residential mix may alter moderately under present zoning and probably establish itself at a level where most all units will be rental single family and double family units in any event.

Appropriateness

The subject lot...could provide up to 9 units by medium density standards using 32 units an acre as a general guide to such a zone.

> The above figure presumes that everything is removed from the site including the in ground pool and existing structure to provide a better arrangement of structure and 14 parking spaces. The economics are likely not good for this happening since the current structure is new and large, likely having some significant value associated with it. Indeed the request is for the addition of only 2 additional units which is practical, notwithstanding that the pool would likely still need to be removed to provide the necessary parking (6 spaces). It would appear from this that the lot is large and in an area already well established as an area with a significant portion of the lands zoned medium density. I believe therefore Policy 202(b) should be considered in this application....
> Note: Clause 501(b)(iv) see Traffic Authority's letter regarding Curtis Drive at Glenwood Drive concern in particular. This problem is in effect a situation to be resolved by the Town. If the Town is not committed to solving the Traffic Authority's concerns in some physical way within 24 months, then serious considerations should be give [sic] to not rezone these or other lands using Curtis Drive until such commitment can be made.
>
> Conclusions and Recommendations
>
> That Town Planning Advisory Committee recommend to Town Council to rezone these lands as requested subject to satisfying the principal concerns of the Traffic Authority regarding intersection safety within 24 months. If not, this rezoning should be withheld until such commitment is made."

Mr. Nelson stated that the Police Chief is the Traffic Authority for the Town. He said the traffic authority agreed with Mr. Miller's criticism of the traffic conditions at the corner of Curtis and Glenwood.

Mr. Nelson expressed the opinion that the policies of the Town's Municipal Planning Strategy ("M.P.S.") governing rezoning allowed Council discretion.

Mr. Nelson said that he had approached the Town Engineer concerning the traffic problem. Mr. Nelson felt the

Town Engineer had no plans for engineering on Glenwood to cure the apparent traffic problem there. Mr. Nelson suggested a possible solution for the possible improvement of the intersection would be to re-grade Glenwood Avenue west of Curtis.

A.L. Murray, Chief of Police and Traffic Authority for the Town, resides on Curtis Drive. On March 18, 1988, he filed a report concerning the proposed rezoning.

The text of that report is as follows:

"Re: Rezoning 43 Curtis Dr., R2 to R3

In answer to your request, regarding concerns I might have in the above noted rezoning request.

It is my understanding that the purpose of the rezoning is to build additional apartments in the area. I would list the following concerns:

1. Additional apartments would generate more vehicular traffic in the area. This would compound the existing traffic problem at the intersection of Curtis Drive and Glenwood Drive. The problem is the sighting distance is very short for vehicles leaving Curtis Drive and entering Glenwood Drive. This creates a danger to the motoring public.

2. The additional apartments would, no doubt, bring more children into the area. This would create a safety problem, as there is no immediate playground and the children now play in the street.

3. The existing apartments on Curtis Drive have caused concerns to the other residents, due to the noise factor from persons going to and from the apartments during the night time hours.

The Police Department has received numerous calls from residents in the area, concerning the noise problem. On one occasion it was necessary for me to meet with some of the residents concerning their complaints about noise, and unfavourable behavior caused by the apartment occupants."

Chief Murray made no disclosure either in his report or verbally at Council that he was a resident of Curtis Drive. He said, however, that council members would be well aware of his residence. He saw no need to explain to them formally that he might have an interest in the outcome of the rezoning application.

Chief Murray felt he based his report objections 25% on the noisy behaviour of the inhabitants of the street's existing apartment units. He said that 75% of his report relied on the dangerous traffic conditions and their risk to the safety of the children.

Marian Anne Waller is a non-resident landlord of a multiple unit property situate immediately south of the subject property. She objected to the rezoning on the grounds that the appellants did not maintain properly the present property. She said that they conducted themselves in a noisy and unneighbourly fashion on the lot. She felt that their present conduct made it difficult for her to rent her units when they became vacant.

Mrs. Waller also said that Council had the issues before it and had made a decision and the Board should not interfere.

Lois Seel, a businesswoman, owns a single family house near the subject property on Curtis Drive. She feels additional medium density housing will devalue her house. She agrees with the other witnesses as to traffic.

Councillor Vincent Roberts owns (and at one time lived in) a house close to the subject land. As such owner, he received a delivered notice of the Council rezoning hearing. He said he did not disclose his ownership either at the P.A.C. meeting or the Town Council meeting. At both meetings he said he had opposed, and voted against, the present rezoning application.

Councillor Roberts agrees with the opposition to rezoning already expressed. He said he felt the overriding policy of the M.P.S. was the policy to continue existing uses and protect them.

John Hasiuk, a resident of Curtis Drive, said that he is upset by past and present rezonings. He said he therefore contemplates moving out of Truro. He suggested that this rezoning would be an extra encouragement for him to move.

P.A.C. recommended to Council that it turn down the rezoning. Council turned down the rezoning.

Mr. Gruchy argued that the Council had considered all relevant policies of the M.P.S. He argued that the Council had heard and considered all representations for and against the application to rezone. He argued that the Council had a discretion whether or not to rezone and it exercised that discretion reasonably. He said the Board had no power to alter the decision of Council which reasonably met the intent of the M.P.S.

Mr. MacMillan argued that the traffic consideration used by Council to justify its refusal decision was not a real objection. He said construction of two extra units would exacerbate the traffic problem so slightly that it did not constitute a proper objection. He felt Council used "traffic" as a hook on which to hang Council's decision. He said Council decided for motives not contemplated by the M.P.S.

On its view, the Board found it difficult to accept the traffic safety problem complained of at the Curtis Drive-Glenwood intersection. Despite this impression from the view, the evidence from both the Appellants and Respondent shows there is a problem at this intersection. Mr. Nelson's testimony also clearly shows that he wishes this problem cured before future development comes in. The Board therefore must accept the evidence of all the parties concerning traffic problems. The Board therefore finds the intersection traffic problem exists as described by the Chief of Police and by Sandy Miller. It further accepts that the Town Council has taken no steps to alleviate this problem and has none planned.

Left to its view of the site, the Board would take the impression that a couple of basement apartments in the subject property would hardly be apparent to the street. Their use would exacerbate the traffic problem only slightly.

The Board also notes that Mr. Nelson's report shows that the development of the basement apartment would eliminate the in-ground pool. That swimming pool would disappear to make room for the necessary parking. The pool caused a great deal of concern to many of the neighbours objecting to this rezoning. Witnesses expressed this view. It is also clear from Mr.

Nelson's report.

The Board accepts Mr. Murray's and Mr. Miller's testimony. They said a couple of extra residential units will exacerbate slightly poor traffic conditions on this street.

Section 63(1)(b) of the **Planning Act** allows the applicant to appeal a refusal decision of Council.

Under Section 63(3) of the **Planning Act**:

> "The Board shall determine whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy."

Under Section 63(4) the Board may:

> "a) confirm the decision of council;
>
> b) allow the appeal by reversing the decision of the council amending or revising the land-use by-law; or
>
> c) allow the appeal by instructing the council to amend the by-law in the manner prescribed by the Board."

Under Section 63(5):

> "The Board shall not allow the appeal unless the Board determines that the decision of the council cannot reasonably be said to carry out the intent of the municipal planning strategy."

Under Section 63(7):

> "Notwithstanding subsections (5) and (6), the Board may allow an appeal by an applicant if, in the opinion of the Board,
>
> a) the applicant would suffer undue hardship; or
>
> b) extraordinary and compelling circumstances are present."

The Board has satisfied itself that Section 63(7) has no application. There is no indication the applicant would suffer undue hardship. There are no extraordinary and compelling circumstances present.

On a view of the site the Board felt that this development would apparently cause no problems in the area.

It is not the opinion of the Board from a view alone that prevails. The Board must consider the whole of the evidence before it. It must then determine whether the decision of Council reasonably carries out the intent of the M.P.S.

The Board finds that the Council had traffic concerns. The Board believes that, under the policies of the M.P.S., the Council considered and decided on the basis of those concerns.

Therefore, the Board must find that the decision of the Council reasonably carries out the intent of the M.P.S. It cannot allow the appeal. It must dismiss the Appeal.

An Order confirming the decision of Council will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 19th day of October, A.D., 1983.

RICHARD E. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

ELMER'S AND CASABLANCA RESTAURANT LTD. v. WOLFVILLE

PLANNING - MUNICIPAL DEVELOPMENT PERMIT - REFUSAL TO ISSUE PERMIT FOR BEVERAGE ROOM OR LOUNGE - COMMERCIAL TOWN CENTER ZONE- PLANNING ACT SS. 78(3); WOLFVILLE L.U.B. PART 2, DEFINITION 103.

E & C R Ltd. operated 2 restaurants in Wolfville. E & C R Ltd. applied to Development Officer of Wolfville, for a development permit to permit a "beverage room and/or lounge". There is one beverage room in Wolfville. It is listed in the M.P.S. and the L.U.B. as a non-conforming use.

HELD: The Board dismissed the appeal.

To allow the appeal the Board must find that beverage rooms and lounges are permitted in the C-1 Zone. "Restaurant" is a use listed in the L.U.B. for C-1 Zones. The sole issue of this appeal is whether or not the word "restaurant" in the L.U.B. includes "beverage rooms and lounges". The L.U.B. has a special definition for restaurant. The exhibits submitted supported a definition of "restaurant" which did not include beverage room and lounges. Allegations that other Municipalities interpreted "restaurant" as including beverage rooms and lounges were not proven in evidence. The Board therefore cannot consider how other municipalities defined "restaurant". The Board is satisfied that "restaurant" in Wolfville's L.U.B. does not include "beverage room and lounges".

NOTE: Leave to appeal to the Nova Scotia Supreme Court Appeal Division was denied.

NSMB-15-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S., 1983, c. 9, as amended, by **ELMER'S AND CASABLANCA RESTAURANT LIMITED** from a decision of **GREGG MORRISON**, Development Officer for the **TOWN OF WOLFVILLE**, made June 17, 1988, which decision refused to issue a Municipal Development Permit to allow the Appellant's property located at 292-296 Main Street, Wolfville, to operate as a beverage room and/or lounge.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: WILLIAM L. RYAN, Q.C., on behalf of the Appellant;

A. WILLIAM COX, Q.C., and JOHN CRAWFORD, Articled Clerk, on behalf of the Town of Wolfville.

HEARING DATE: September 29, 1988.

BRIEFS SUBMITTED: October 11, 1988 - Appellant
October 21, 1988 - Town

DECISION DATE: November 2, 1988.

DECISION: Appeal Dismissed.

DECISION

The Appellant, **ELMER'S AND CASABLANCA RESTAURANT LIMITED**, operates two licenced restaurants at 292-296 Main Street, Wolfville. Youseff Rafih, owner of the Appellant company, applied for a development permit to operate a "beverage room and/or lounge" at 292-296 Main Street. The Town's Development Officer, Gregg Morrison, refused to issue the development permit on the ground that a beverage room and/or lounge is not a permitted use within the Commercial Town Centre (C-1) Zone. Town Council supports the refusal.

Mr. Rafih testified that he plans to turn a portion of the Casablanca Restaurant into an English-style pub and to sell draft beer. He wishes to diversify the business because of anticipated competition from two proposed restaurants for the Town. He believes there is a demand for such an establishment.

The Anvil Beverage Room has been in operation for a number of years. In 1978 when Council adopted the Municipal Planning Strategy ("M.P.S.") and the Land Use By-law ("L.U.B."), it designated the Anvil as an existing non-conforming use. There are no other beverage rooms in Wolfville. There are a number of licenced restaurants and at least two licenced clubs. A facility on the Acadia campus, described as a lounge, may be a club as well. There are no other lounges in the Town. The L.U.B. permits restaurants and clubs in the C-1 Zone.

Mayor Townsend, Roy Thompson, Town Clerk/Treasurer, and Gregg Morrison testified on behalf of the Town. The Town also called evidence from the local police and Kenneth Cook, Chief of Police for Middleton, about the problems associated with patrons leaving beverage rooms and heading for lounges.

A number of churches expressed their support of the decision to refuse the permit. Fred Grimer, Roger Prentice and Ian Porter testified in support of the decision to refuse the permit. Mr. Douglas Cochrane, a local businessman, was called by the Appellants and testified that the Appellant's proposal would be good for the Town.

The appeal is pursuant to Section 78 of the **Planning Act** which provides in part as follows:

> "(3) The Board shall
>
> a) confirm the decision of the municipal development officer; or
>
> b) allow the appeal by ordering that the permit be granted, but no permit shall be granted that is inconsistent with the land-use by-law, ...".

To allow the appeal, the Board must find that beverage rooms and lounges are a permitted use in the C-1 Zone. A successful appeal means that other properties in the C-1 Zone may qualify as lounges or beverage rooms.

Among the permitted uses listed in the L.U.B. for the C-1 Zone are restaurants. Part 2 of the L.U.B. contains this definition of "restaurant":

> "For the purposes of this By-law, all words shall carry their customary meaning except for those words defined hereafter:
>
> 103. Restaurant means a building or part thereof where food and drink is served to the public for consumption within the building".

The sole issue in this appeal is whether the word "restaurant" as defined in the L.U.B. includes beverage room and lounges.

Given the introductory words of the definition section of the L.U.B., the Board cannot simply apply the standard dictionary definition of a restaurant and find that a beverage room or a lounge is not a restaurant.

The Appellant argues that since food in addition to drink will be served in the proposed pub, it comes within the definition in the L.U.B. The Appellant further argues that the absence of definitions of "beverage room" and "lounge" indicates that they are included in the meaning of "restaurant".

The Town argues that "restaurant" does not include beverage room or lounge and that the absence of these terms in the list of definitions is not unusual given that they are not permitted.

The terms "beverage room" and "lounge" are used in the **Liquor Control Act**, R.S.N.S., 1967, c. 169, as amended, to describe different classes of licences. What is commonly thought of as a licenced restaurant is classed as an eating establishment under the **Liquor Control Act**. The Act provides that the Liquor Licence Board may by regulation prescribe a ratio of food and liquor consumption on the premises for any type of licence. A specific ratio is prescribed for eating establishments. In addition the holder of an eating establishment licence shall not serve liquor to a patron unless food sufficient to constitute a meal is also served to the patron. Food services must be available at certain times in both beverage rooms and lounges but there is no requirement that a patron be served food with the service of liquor.

In interpreting the meaning of the word "restaurant", the Board has examined the various exhibits tendered by both parties. Some of these exhibits show how Council, the Planning

Advisory Committee ("P.A.C.") and residents of the Town have interpreted the word.

Exhibit E-9 contains the Minutes of a Public Hearing held on April 21, 1980. Council considered a motion to amend the L.U.B. to add beverage rooms and taverns to the list of permitted uses in the C-1 zone. The Town Solicitor, Derick Kimball, advised that if the amendment did not pass, "taverns and beverage rooms would not be permitted to locate in the Town Centre". Council defeated the motion to amend. Council referred the matter back to P.A.C. which on May 7, 1980, tabled it indefinitely.

Exhibit E-6 tendered by the Appellant is a series of letters from Boardwalk Equities Ltd. ("Boardwalk"), a local company organizing a major mixed-use project in the C-1 Zone. Mr. Rafih is Vice-President and a shareholder of Boardwalk. The exhibit includes a letter dated April 7, 1988, to the P.A.C. concerning the review of the M.P.S. and L.U.B. The company recommended that P.A.C. include lounges in the list of permitted uses in the C-1 Zone.

A second letter from Boardwalk to the Chairman of P.A.C., dated May 16, 1988, includes a copy of some of the findings of a marketing study of Wolfville. The study surveyed residents about desired improvements to the Town. Of 163 persons approached, 13% indicated more night clubs/pubs/discos were desired. Of 142 persons contacted by telephone, 5% were in favour of more night clubs etc. The letter concludes "this study, therefore, supports our call for adding a lounge use to the list of permitted uses in the C-1 commercial zone".

The third letter in Exhibit E-6 is addressed to the Board and states, in part, that the refusal of P.A.C. to provide for lounge use in the revised L.U.B. and M.P.S. has "led to the present showdown between Mr. Rafih and the Town".

Exhibit E-4 is a petition submitted by the Appellant. Mr. Rafih testified he obtained the names by leaving the petition on the counter of his restaurants. He further stated that the petition was intended to support Boardwalk's proposal for a lounge. The petition is headed as follows:

> "THE UNDERSIGNED PETITIONERS
> HEREBY INDICATE THEIR DESIRE FOR,
> AND SUPPORT OF, A LOUNGE FACILITY
> IN DOWNTOWN WOLFVILLE
>
> AND MAKE APPLICATION TO THE
> PLANNING ADVISORY COMMITTEE FOR
> THE INTRODUCTION OF APPROPRIATE
> BY-LAWS WHICH WOULD PERMIT A
> FACILITY OF THIS TYPE."

All of the exhibits discussed above support a definition of restaurant which does not include "beverage rooms" or "lounges". The exhibits indicate that Town Council, P.A.C. and various residents believed that an amendment to the L.U.B. was required before a beverage room or lounge could be permitted in the C-1 Zone.

While reference was made during the hearing that certain municipalities permitted beverage rooms and lounges under a similar definition of restaurant, neither party tendered into evidence copies of the L.U.B. or M.P.S. of other municipalities. The Board therefore, cannot consider how other municipalities have interpreted the word "restaurant".

The Board is satisfied that the word "restaurant" in the Town's L.U.B. does not include "beverage rooms" and "lounges". The Board dismisses the appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 2nd day of November, A.D., 1988.

Linda Garber

LINDA GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

FONG'S RESTAURANT v. MUNICIPALITY OF THE COUNTY OF HALIFAX

PLANNING - L.U.B. AMENDMENT - REFUSAL TO REZONE FROM R-1 TO C-2- SINGLE UNIT DWELLING ZONE - GENERAL BUSINESS ZONE - WHETHER REASONABLY CARRIES OUT INTENT OF M.P.S. - RESTAURANT USE- PARKING - GEN. FLUM DESIGNATION - COMMERCIAL - CONTENTS OF STAFF REPORT - UNDUE HARDSHIP - EXTRAORDINARY AND COMPELLING CIRCUMSTANCES - BUFFERING - MUNICIPAL BOARD ACT SS. 16(1); 27(4); PLANNING ACT SS. 63(1)(b); 63(3); 63(4); 63(5); 63(7); COLE HARBOUR/WESTPHAL M.P.S. POLICIES P-49; P-92; P-92(iii); P-51; P-93; P-98.

F owned three adjacent lots, including a corner lot. There was a restaurant and retail store on one lot; a take-out restaurant on the corner lot and a house on the third lot. F subdivided lots and made an application to rezone 300 square feet from the residential lot from R-1 to C-1. The other lots were zoned C-1 and the area was designated Commercial on the Gen.FLUM. Staff recommended rezoning but Council refused. A neighbour, L, was designated an "interested person" and participated in the hearing. L objected to the rezoning and alleged that F had violated health regulations and the L.U.B.

HELD: The Board dismissed the appeal and confirmed the decision of Council.

The gross failure to provide parking within the L.U.B. requirements makes this rezoning application outside the intent of the M.P.S. The proposal would cause existing businesses on the site to suffer from worse parking.

Staff should draft its reports to P.A.C. with specific reference to the M.P.S. policies and intent. Thus the policies are available to Council. This process also ensures that staff has completed its checklist of issues.

The decision of Council may have caused F. hardship. If it did, it was not undue hardship on F. It was, at most, the type of hardship usual in the course of business. Subdivision approval, a necessary basis for the rezoning, had been given. Planning staff had approved proposal. F alleged that these actions lead him down the "garden path". The Board said misleading by a municipal official in some circumstances might be "extraordinary and compelling circumstances" forcing the Board to grant relief. The actions of staff in this case did not amount to that.

Evidence shows that the decision of Council reasonably fits within the intent of the M.P.S. and it shows that the proposal does not.

NSMB-21-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, Chapter 9, Statutes of Nova Scotia, 1983, as amended, by **FONG'S RESTAURANT LIMITED**, whereby the Appellant appeals the decision of the Council of the **MUNICIPALITY OF THE COUNTY OF HALIFAX** made the 8th day of August, A.D., 1988, which decision rejected a request to rezone parcel "B" at 1241 Cole Harbour Road from R-1 (Single Unit Dwelling) Zone to C-2 (General Business) Zone.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: THOMAS M. MacDONALD, LL.B., and RICHARD MELANSON, Articled Clerk, on behalf of the Appellant;

ROBERT G. CRAGG, LL.B., on behalf of the Municipality of the County of Halifax;

ROGER LINTAMAN, an Interested Person, on his own behalf.

HEARING DATE: November 2, 1988.

DECISION DATE: December 2, 1988.

DECISION: **Appeal Dismissed.**

DECISION

This is an appeal under the **Planning Act**, S.N.S. 1983, Chapter 9. **FONG'S RESTAURANT LIMITED**, Applicant before the Municipality, appealed the **MUNICIPALITY OF THE COUNTY OF HALIFAX'S** August 8, 1988, decision. The Appellant had applied to rezone Parcel "B", a portion of its property at 1241 Cole

Harbour Road (Lot B2ZD) from R-1 (Single Unit Dwelling) Zone to C-2 (General Business) Zone. The Council's decision refused this application.

Under Section 16(1), Chapter 9, S.N.S. (1983) the **Municipal Board Act**, the Chairman assigned Board Member, Richard L. Weldon, to determine this appeal.

Upon the opening of the hearing, Roger Lintaman made representation to the Board and applied to join himself as an Interested Party. Mr. Lintaman was one of the owners of the land adjacent to, and north of, the subject property. Under Section 27(4) of the **Municipal Board Act**, the Board permitted Mr. Lintaman to participate as an Interested Party. Mr. Lintaman had a real and substantial interest in the subject matter of the proceeding before the Board.

The Board heard this appeal at its 10:00 a.m. November 2nd, 1988, sittings. The Board held these sittings at the Council Chambers of the Municipality of the County of Halifax, 2750 Dutch Village Road, Halifax. After the hearing and argument, the Board reserved its decision and adjourned to view the site.

The Board received the Notice of Appeal and Undertaking to pay the Notice of Hearing Advertisement costs on August 25, 1988.

The grounds of appeal are:

> "(1) That the decision of the Municipal Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy.

(2) That as a result of the decision of the Municipal Council, the Appellant will suffer undue hardship."

The Municipality consented to the Board's jurisdiction to hear this appeal on its merits. The Board satisfied itself that the Appellants had met all procedural requirements necessary to support the jurisdiction of the Board.

The Appellants own Parcel "B", the area to be rezoned, now a portion of Civic No. 1241 Cole Harbour Road. It was formerly a portion of Civic No. 4 John Stewart Drive. The Appellants own a Parcel "C" and they own a Parcel "A". They also own Civic No. 1233 Cole Harbour Road. The "County Booklet", Tab 5, Map 4, page 3 (Exhibit F-6) shows these lots and their relationship to each other.

Cole Harbour Road is the main street running east from the Dartmouth boundary through Cole Harbour. Its corner with John Stewart Drive is near the eastern end of two heavy developments, Colby Village and Forest Hills. Colby Village lies to the south of the Cole Harbour Road, Forest Hills is on the north side of Cole Harbour Road. Heavy development, mostly commercial, persists from the City boundary to John Stewart Drive and beyond on both sides of Cole Harbour Road.

1241 Cole Harbour Road contains a building encompassing Fong's Restaurant and a retail outlet known as "Sister Sarah's".

By subdivision, 1241 Cole Harbour road now consists of that lot plus parcel "B". 1233 Cole Harbour Road appears from the plan mentioned to contain Paolo's Pasta House and Parcels "A" and "C", also by subdivision. Paolo's Pasta House is a takeout restaurant.

4 John Stewart Drive contains a residential house with lawns on the west side of John Stewart Drive. Its lot is approximately 63 feet by 89 feet. Landscaped lawn covers the land between the front of the house and John Stewart Drive. Pavement covers the backyard of Civic No. 4 John Stewart Drive. This paving is contiguous with the paving on Fong's Restaurant at 1241 Cole Harbour Road.

Mr. Lintaman is one of the co-owners of Civic No. 6 John Stewart Drive. His lot is about the same size and immediately to the north of Civic No. 4, John Stewart Drive.

The lot to be rezoned is approximately 5.37 feet on its northern boundary and 63 feet in length. It is an irregular four-sided figure. The straight line prolongation of its western line is another 94.23 feet to the boundary of Cole Harbour Road. The boundary of Parcel "A", were it facing on Cole Harbour Road, would be 10.47 feet. The total square footage requested to be rezoned is, by calculation, approximately 380 sq. ft.

Around their buildings, Fong's Restaurant and Paolo's Pasta House have paved areas, much marked off for parking. In the general vicinity of Parcel "A", between Fong's Restaurant and Paolo's Pasta House, the pavement raises like a speed bump. It is easily possible to pass over this pavement to move from one parking lot to the other.

Mr. MacDonald for the Appellant called Paul Morgan and Fred Fong in his case-in-chief. He re-called Paul Morgan in rebuttal.

Mr. Cragg called John Heseltine.

Mr. Lintaman gave evidence himself.

Paul Morgan is the planner for the County of Halifax who processed the application to rezone. The Board accepted him to give expert opinion evidence concerning planning matters as they affected, specifically, the Cole Harbour Westphal area.

Mr. Morgan outlined the usual process of rezoning applications by municipal staff. Mr. Morgan is the author of the Staff Report given to the Planning Advisory Committee (P.A.C.) and presented to Council. The Community Commercial designation covers both sides of Cole Harbour Road west of the City including the subject property. He pointed out that the restaurant use was a permitted use under the Land Use By-law (L.U.B.). He recommended in the Staff Report approval of the rezoning. Mr. Morgan still recommends its approval to the Board. He says the rezoning falls within the intent of the Municipal Planning Strategy (M.P.S.).

Mr. Morgan admitted there were little specific criteria relating to specific policies of the M.P.S. in his report. He said, if the report were deficient in this respect, the report followed the then prevailing policy of the Municipality's planning staff. Mr. Morgan said he was aware of Board decisions, made after this report, which criticised this practice of the Municipality. He said that present Staff reports more clearly reflect the effect of these Board decisions on planner's report formats.

Mr. Morgan felt that Fong's Restaurant did not have enough parking even for its existing business. He said that the Applicant explained to him that it's planned expansion of Fong's Restaurant required 10 more parking spaces. He said that the purpose of the rezoning was to allow for additional parking to accommodate an expansion of the restaurant. Mr. Morgan said he had questioned the parking capability when the application came in. He said Mr. Fong assured him that technicians would work out the parking problem. In doing so, they would use the available land on the Fong's Restaurant property and also on the Paolo Pasta House property. Mr. Morgan did no calculations concerning parking.

Mr. Morgan pointed out the Development Officer would address the matter of parking when the Appellant applied for its development permit. If, at that time, there was not enough parking for a development, the development could not proceed.

Mr. Fred Fong was secretary of the Appellant. He described the ownership of the lands as outlined previously in this decision.

Mr. Fong said that the Appellant had been successful in receiving subdivision approval for rearrangement of its various land ownerships. These ownerships were adjacent properties located at 4 John Stewart Drive, 1233 Cole Harbour Road and 1241

Cole Harbour Road. It accomplished this through the resubdivisions which are evidenced in parcels "A", "B" and "C". The Appellant subdivided its lands to aid its business expansion by enlarging the parking lots. He believed that if the Board refused rezoning Parcel "B" would become a "no man's land". Refusal to rezone, would cause the Appellant undue hardship.

Mr. Fong said the Appellant Company wishes to expand its business and needs the land for parking. Mr. Fong felt technicians could better design parking on the land of Paolo Pasta House and Fong's Restaurant to meet parking requirements. He felt there were twenty-eight existing parking spaces. He would need sixteen more to service the retail space on the Fong's Restaurant property plus Paolo's Pasta House property. He said there were no handicapped parking spaces available now. He said the proposal allows for 48 parking lots.

Mr. Fong said that the parking space behind 4 John Stewart Drive was being used by Appellant employees and residents. He feels there are approximately 18 parking lots on the Paolo Pasta House lot.

Mr. Lintaman then gave evidence on his own. He said that the Minutes of the Council accurately summarized his views on the zoning application that was before the Board. He cited the problems caused him by the Appellant's uses of all of its properties. He said he made no attempt to contact the Fong's people directly. He said he had appealed to his councillors for assistance. Mr. Lintaman said he had called the Health authorities. He said he had taken photographs of the Appellant's use of its properties and presented them to Council. The Board deals with the specifics of Mr. Lintaman's objections later in this decision.

The Municipality called John Heseltine a planner employed as a consultant in the private sector. Mr. Cragg attempted to qualify Mr. Heseltine as an expert to give expert opinion evidence on planning matters affecting Cole Harbour Westphal. Mr. MacDonald objected to this on two grounds. One, that the man was no expert on the Cole Harbour M.P.S. as he had never studied it before. Two, that the absence of a written report surprised Mr. MacDonald. The lack of prior circulation of an expert's report restricted his ability to respond to the opinion and to cross-examine. Mr. MacDonald complained he had no prior knowledge of what Mr. Heseltine was going to say.

The Board listened to considerable argument forwards and back on this particular issue. The Board then ruled that it would hear the evidence as to qualifications and rule on those without an adjournment.

The Board held a voir-dire on Mr. Heseltine's qualifications. The Board found Mr. Heseltine was a planner qualified to give expert opinion evidence on planning matters as affecting Cole Harbour.

Only then were Mr. Heseltine's notes of three or four pages put before the Board as Exhibit F-20. Mr. Cragg distributed these pages to Mr. MacDonald and the Board. The appeal was adjourned until the next day. The Board ruled on the expert witness question without prejudice to Mr. MacDonald's right to apply for a further adjournment on the morrow. The Board would consider any such adjournment application at the end of the examination-in-chief before cross-examination of Mr. Heseltine.

No one requested further adjournment.

Mr. Cragg retained Mr. Heseltine on or about October 20, 1988, to prepare for this November 2nd hearing.

In preparation, Mr. Heseltine had visited the site. He looked at the papers contained in the Municipal Booklet (previously mentioned) which includes the Staff Report. He then made a study of the Westphal Cole Harbour M.P.S. and the L.U.B. He said that, under the L.U.B., Fong's proposal requires 32 parking spaces plus three handicapped parking spaces. Mr. Heseltine feels that Fong's proposal needs 35 parking spaces and there are only 24 parking spaces available. There are no handicapped parking spaces available. He said two spaces presently in use are too near the common boundary line with the land behind the lots in question. He says parking is the main deficiency in the proposal to rezone.

He said that Paolo's Pasta House requires some 29 or 30 spaces and has 20 spaces at present. He said existing there at present are 44 spaces. That is about 1/2 what the L.U.B. requires for the proposed expansion.

Mr. MacDonald called Mr. Morgan in rebuttal. He said he had not changed his opinion after having heard Mr. Heseltine's evidence and having read his notes.

Argument commenced.

Mr. MacDonald's argument, as understood by the Board, was that this was a very minor rezoning approval request presented to Council. He argued that Council could only regard the 300 to 400 square feet that were before Council. The Board, likewise, could only have the same concern when determining whether Council's decision reasonably fit the intent of the M.P.S. Mr. MacDonald argued that the intent of the M.P.S. was to promote commercial development on the lots along Cole Harbour Road. The M.P.S. intended commercial development would develop to some considerable depth back from both sides of that Road. He said it was premature to test the rezoning application against the L.U.B. requirements. Such testing should wait until the Applicant applied for a development permit. He argued that L.U.B. restrictions would apply at that time. Mr. MacDonald argued there was evidence before the Board that redesigned parking would meet the proposal's requirements for parking under the L.U.B.

Mr. MacDonald argued that the Planning Staff had recommended to Council the approval of this rezoning. He said Council had unanimously gone against the advice of its Staff without giving reasons founded on the M.P.S.

Mr. MacDonald further argued that any evidence of previous planning by-law violations by the Appellant was irrelevant. This applied to violations either before or after this application to rezone. He said Council should have ignored such violations. So should the Board when it reviews the decision of Council. He said that were sufficient remedies contained in the various By-laws to rectify any justified complaints made against the Appellant. Those complaints, argued Mr. MacDonald, had nothing to do with the present application.

Mr. Cragg conceded Council's very full Minutes gave no indication that staff had brought any specific M.P.S. policies to Council's attention. No one else who spoke at the meeting informed Council of any specific M.P.S. policies. He did note, however, that the Minutes heavily emphasized parking concerns.

Mr. Cragg said Mr. Lintaman had dealt thoroughly with the Appellant's use of all its adjacent properties on and near the rezoning.

Mr. Cragg said that the M.P.S. required Council to take into account parking considerations on any proposal put before it. At the time of the rezoning application, Mr. Cragg argued there was a significant shortage of parking spaces. Skillful redesign within the lot boundaries could not cure the major shortage of available parking spaces.

Mr. Cragg argued that the proposal would require a grand total of between 80 to 85 parking spaces. Some of these spaces had to be oversized handicapped parking spaces. After all possible redesign and adjustment, Mr. Cragg said there would be a gross shortage of some 40-odd parking spaces. He said this parking deficiency was a major deficiency. Council could not ignore it at the rezoning stage of development.

Mr. Cragg made no particular argument respecting the use of the Appellant on any of its lots regarding any By-law infractions.

The Board's view of the site corroborated the utility and accuracy of map - 4, previously mentioned.

The Staff Report to PAC, subsequently referred to Council, prepared by Mr. Morgan, contained no specific M.P.S. policy references. This decision previously recounted Mr. Morgan's explanation of the lack of specific M.P.S. policy references in Staff Reports.

The following Board cases have dealt with Staff Reports:

1. Florence Developments Limited v. Municipality of the County of Halifax, 1987 NSMB-603-87-P (unreported), at pages 37, 64 and 65.
2. Benedict v. Town of Truro (1985) 4B M.B.D. 291 at page 328.
3. Beaufort Mader v. Municipality of the County of Halifax, NSMB-602-87-P (unreported) at page 9.

Mr. Morgan clearly explained that he was following the staff policy when he made the report in this case. He made it in early 1988. The Board's decision in the Beaufort Mader case came down June 24, 1988. The Staff Report signed its present report in March, 1988.

The Board did not decide Florence Developments until June 6, 1988. The decision was later than the Staff Report in this particular appeal. Benedict, in Truro, was not.

The Board, in this appeal, repeats its previous comments concerning Staff Reports. Those comments reinforce the Board's view that Staff should draft reports with specific reference to the M.P.S. policies and intent. This ensures edification of Council, if Councillors read Staff Reports, and ensures that staff has touched all the issues.

Considerable evidence here concerned the Appellant's uses of the lots of land previously described which included the subject land. The Board notes particularly that Mr. MacDonald objected to much of this type of evidence as irrelevant.

Mr. Heseltine testified that even the present unextended use of Fong's Restaurant parking spaces exceeded the L.U.B. limitations. He further stated there would be about 40 parking spaces short were the development to proceed as proposed. Mr. Morgan did not contradict this view and said that he had not studied parking in any detail. When Mr. Fong testified he said that he had not studied parking in detail either. He felt that the extensions and boundary readjustments could cure the problem.

The Board accepts the testimony of Mr. Heseltine on this point. It finds that the present use of the Fong's Restaurant exceeds the parking provided for it in these respects:

1) There are not enough spaces in gross.

2) There are no spaces appointed for handicapped parkers. The L.U.B. requires both.

In any proposed combination brought before the Board, parking is short about 40 spaces for the present and proposed needs of Fong's.

Mr. Lintaman said there have been health violations concerning the outside drying of food in close proximity to open garbage. He said there have been problems with garbage disposal and the necessity to call for health inspectors. There was no direct evidence to contradict this. The Board, if it is germane to the result of this appeal, accepts the testimony of Mr. Lintaman on this point.

Mr. Lintaman has said that the drying of food was not for personal use of the inhabitants of 4 John Stewart Drive. He said people dried food in a quantity consistent only with its use, commercially, in Fong's Restaurant. Mr. Fong has testified the outside food curing was for to the personal use of the inhabitants of 4 John Stewart Drive. On this point and if germane, the Board accepts the testimony of Mr. Lintaman as more likely to be correct.

Mr. Lintaman insists that Fong's Restaurant has used, to this date, two parking spots on the property for customer parking. Mr. Heseltine said these two spaces lie within the 15-foot area next to the residential properties to the north of the Fong Restaurant property. The L.U.B. prohibits parking there. This evidence is uncontradicted and the Board accepts it.

Mr. Lintaman has testified that Fong's uses the paved unmarked rear portion of 4 John Stewart Drive for its commercial parking. R-1 zoning applies to that area. Mr. Fong testified the inhabitants of 4 John Stewart Drive and the employees of Fong's Restaurant use this property for the parking. Evan accepting Mr. Fong's evidence on this, such use by employees of Fong's Restaurant is a commercial use related to that restaurant. See the case of the Municipality of the County of Kings v. Betty Lou Reid, Rocky Reid and Wanda Reid, (1988) S.K. No. 2358 (unreported) decided on May 13, 1988 by Mr. Justice William J. Grant.

Kings v. Reid is a study by the Supreme Court, Trial Division, of the commercial use of residential premises. Parking by employees of Fong's Restaurant on this adjacent parking lot is a commercial use of a residential property.

Mr. Lintaman has alleged, without having any precise knowledge of the matter, that principals of Fong's occupy 4 John Stewart Drive. They use the residential portion of the property in a manner contrary to R-1 requirements. Mr. Fong has testified that several related individuals (nieces and nephews) occupy the upper stories of the house. He said several employees of Fong's Restaurant Limited occupy the basement as residential premises. The Board wonders whether such occupation of the house conforms to the R-1 occupational requirements of the L.U.B.

Mr. MacDonald has argued strenuously that these complaints do not enter upon this appeal. They ought not to have any weight in the mind of the Board. He says the Board should not even consider them. If the Board understands his arguments correctly, he argues the Board should not even hear the evidence on these points.

The Board takes a look at Fournier et al v. County of Halifax, (1985) 4-B M.B.D. 379, at page 380 in the headnote there is this statement:

> "The subject land has been used in ways that are either non-conforming or illegal."

At page 406 of that decision there are some useful guides for this appeal:

> "...Charles Conrad Jr. impresses the Board as being, to say the least, a free enterpriser in the extreme sense of the word. He has had problems with his use of the land since at least 1978. He put a building on the lot without a permit. He has used the lands as a salvage yard, without the required permits, both in the 1970's and in 1985. He has spilled the uses of the lot over the lot boundaries onto other lots which were also not appropriately zoned... Charles Conrad Jr., on the evidence, seems to have the attitude of a free user of property..."

And further at page 408:

> "...These uses, if they existed at the time of the original zoning by Council and to the extent not dealt with in Appendix "D", are either illegal, or non-conforming uses of the land as the case may be."

And further at page 424:

> "...If the Council chose not to follow up its duties under P-94 (which it has demonstrably not done in this case), then it is clear that it has acted by acquiescing in these violations. In such acquiescence, Council appeased the offender by trying to give him a prefered status under the land-use by-law: it has thus acted in contravention to its own

M.P.S....given the scoff law attitude and history of the Applicant...".

Mr. MacDonald says most strenuously that none of these considerations should enter into this decision. He said that the application to rezone the few hundred square feet is all that is actually before the Board. It is all the Council (and the Board on review from the Council) ought to consider.

The Board feels it cannot look at planning matters in such a narrow fashion. In planning matters, councils (and the Board) should probably look to the general consequences of the proposals put before them. The Board looks to Fournier. It says that, at the least, a scoff law attitude on behalf of an applicant may in some circumstances be germane. It may give a flavour to the conduct and resolution of the public hearing and the following appeal to the Board.

The Board takes care to note that no one was charged or convicted with any health or Land Use violation concerning the subject property. The Board takes further care to note that it has no jurisdiction, itself, to try any person for any such alleged infractions.

Even if Mr. MacDonald is correct in that the Board should have no regard for these health and land use violations, the Board still has sufficient other evidence before it to resolve this appeal.

Mr. MacDonald has relied strongly on the positive planning report of staff put before P.A.C. and the Council. He cited the Board case of Carey v. County of Kings (1985) 4-B, M.B.D. 96 at page 97 in the headnote this statement appears:

> "The Board recognizes the legitimate concerns of Council in not wanting to appear to sanction the use of property contrary to the Land Use By-law, but these concerns are not a matter for the Board to consider in an appeal from Council's decision. With respect to concerns raised at the public hearing, the Board is of the opinion that where these views are contrary to the intent of the M.P.S., Council should be guided by the policies in the M.P.S. and not the views expressed in public hearings."

At page 118 this quotation appears:

> "There is no policy direction in the Municipal Planning Strategy to cover situations where an amendment to the Land-use By-law which otherwise carries out the intent of the Municipal Planning Strategy results in the rezoned property contravening a zoning regulation..."

Carey recognized Council's legitimate concerns of not wanting to appear to sanction the use of property contrary to the L.U.B. regulations. In the opinion of the Board, [page 119]:

> "These concerns, although valid from Council's point of view, are not a matter for the Board to consider on appeal from Council's decision. The issue for the Board to determine is whether Council's decision reasonably carries out the intent of the Municipal Planning Strategy...
>
> In the opinion of the Board, Council should listen to the views expressed at public hearings and consider them in their deliberations. However, the Board is of the opinion that where the views expressed at public hearings are contrary to the intent of the Municipal Planning Strategy, Council should be guided in reaching its decision by the policies of the Municipal Planning Strategy and not by the views expressed in public hearings."

Carey was an application to rezone a property from residential R-1 to Institutional I-1. This rezoning permitted the use of the property for religious and educational purposes. The applicant proposed to turn an existing residential building into a building for religious use. The building then in an Institutional zone would be too close, under the L.U.B., to the boundary of residential property. The side yard would be too small. According to the Board's finding in *Carey*, the side yard requirement might have been capable of waiver as a variance. The Board in *Carey* made no finding in this respect.

In the present case the proposal would violate the L.U.B. by providing much less parking than the L.U.B. would require. The development proposed would exacerbate parking problems. A sit-in restaurant (Fong's Restaurant), a take-out restaurant (Paolo's) and a retail outlet (Sister Sarah's) would all suffer from worse parking.

Mr. MacDonald cited *Three Star Developments Limited* v. *County of Halifax* (1986) 5-B, M.B.D. 290. (Leave to appeal was sought and granted on *Three Star Developments Limited* and appeal abandoned before the appeal was heard). At page 290 in the headnote is this statement:

> "If Council wishes to act contrary to the advice of staff, it must be sure it does not proceed in a manner contrary to the intent of the M.P.S. The Board adopts the planning staff's interpretation of the M.P.S. as it applies to the appeal in hand."

At page 31 of the decision this quotation appears:

> "...Council is not bound by the advice of their planning staff...if Council wishes, in a given planning matter, to disregard and to act contrary to appropriate staff advice, it must be sure it does not, in so acting, proceed in a manner contrary to the intent of the M.P.S."

In the present case, of course, planning staff has reported to Council this advice:

1. The staff has tested the proposals against the intent of the M.P.S. Without specifically referring to any policies, Staff has said that the proposal falls within the intent of the M.P.S.

2. Specifically the Applicant can resolve any parking problems that appear to exist at the development permit and building permit stage.

3. That the rezoning should pass.

Mr. MacDonald then argued there were no other references in the very extensive minutes of Council to any M.P.S. policies. Council only had before it those vague M.P.S. references contained in the Staff Report. Mr. MacDonald argues that the Board can only read those minutes to judge Council's decision. The Board can then only find there were no contrary policies advocated to Council. Therefore Council and this Board could not deviate from Staff Report's opinion that the rezoning fell within the intent of the M.P.S. This is the nub of this matter, as the Board understands Mr. MacDonald's argument.

Section 63(1)(b) of the **Planning Act** allows the Applicant to appeal a refusal decision of Council. Under Section 63(3) of the **Planning Act**:

> "The Board shall determine whether the decision of the Council reasonably carries out the intent of the Municipal Planning Strategy."

Under Section 63(4) the Board may:

> "a) confirm the decision of Council;
>
> b) allow the appeal by reversing the decision of Council amending or revising the Land Use By-law; or
>
> c) allow the appeal by instructing the Council to amend the by-law in a manner prescribed by the Board."

Under Section 63(5):

> "The Board shall not allow the appeal unless the Board determines that the decision of the Council cannot reasonably be said to carry out the intent of the Municipal Planning Strategy."

Under Section 63(7):

> "Notwithstanding subsections 5 and 6, the Board may allow an appeal by an applicant if, in the opinion of the Board, a) the Applicant would suffer undue hardships; or b) extraordinary and compelling circumstances are present."

The Board believes that Fong's Restaurant Limited may have suffered hardship. It has expended funds on the resubdivision of three small lots of land. It has apparently conducted renovations within Fong's Restaurant with a view of the proposal succeeding. Space restrictions prevail in its use of its present quarters in its present location. The rezoning could only alleviate the parking problem somewhat. The witness from Fong's Restaurant Limited says that it has suffered hardship and needs the rezoning. The refusal of the rezoning may be a hardship in itself.

The Board must therefore look to Section 63(7) of the **Planning Act** and determine whether there was undue hardship.

The Board considered all the heads of hardship mentioned above. If these complaints are hardships, they are the usual hardships incurred in the course of business. If a person takes an aggressive stance on planning matters, he must expect setbacks on occasion. In summary, the Board is of the opinion there is no undue element in any hardship proven in this appeal. On the undue hardship issue, Section 63(7) of the **Planning Act** has no application in this appeal.

Mr. MacDonald had made some further argument that the Municipality's staff led Fong's Restaurant down the garden path. It granted staff approval and subdivision approval thus creating extraordinary and compelling circumstances for which the Board must grant relief. Possibly in a given case a misleading by a municipal official might create extraordinary and compelling circumstances relievable by the Board. In this particular case, there are no such extraordinary and compelling circumstances. Thus again, Section 63(7) of the **Planning Act** has no application in this appeal.

Mr. MacDonald, to win for the Appellant, has the burden to show that Council's decision does not reasonably fit the M.P.S.'s intent.

Situations exist where both the Applicant's proposal and Council's decision (although contrary in result) both fit within the intent of the M.P.S. No one in this case has argued that situation prevails here.

Mr. Cragg argued that the decision of Council (either by accident or design) fitted within the intent of the M.P.S.

Mr. Cragg said that the proposal of the applicant does not. He argued it does not fit because it does not meet the parking requirements of the L.U.B. Council must use these requirements in its review of the proposal under the M.P.S.

Mr. MacDonald's contrary argument said the M.P.S. demands commercial rezoning of the area concerned. Parking is a secondary matter best left to development permit applications. Mr. Morgan's evidence supports this argument. Mr. MacDonald further argued that the Council decision should differ from opinion of its staff only in rare instances. Council should not differ in this instance where its Minutes show "no reason to do so".

This appeal is similar in some respects to Laba v. Town of Kentville. (An unreported case of the Board dated September 9, 1987, under NSMB-577-86-P, leave to appeal granted by Mr. Justice Hart, September 24, 1987, and appeal dismissed, Town of Kentville v. Laba 38 M.P.L.R., 170).

In Laba the rezoning applied for, approved by the planning staff and approved by Council, supported a proposed large subdivision. The L.U.B. of Kentville required a 66-foot arterial road to service such a subdivision. There was nothing in the proposal to indicate that Council was committed to provide this road to the appropriate width. The circumstances allowed two substitute roads, each some eight or nine feet narrower than L.U.B. requirements. Kentville's planning witnesses and staff said that the Town could address this deficiency at the subdivision approval stage after rezoning. They said that, at that time, Council could address the road problem. It could expropriate, or otherwise get, the necessary width for the arterial road. The Board took a contrary view and was upheld on appeal.

The Board in Laba said that it must have regard for the whole of the M.P.S. and apply it to Council's decision. The M.P.S. of Kentville incorporated by reference the specific by-law into the M.P.S. that the proposal would violate.

The Board (contrary to Mr. Morgan's evidence) has found there is a present shortage of parking to service the restaurant. The proposed expansion will cause the existing shortage of parking spaces to increase markedly. The Board has accepted the evidence of Mr. Heseltine in this. It has discounted the contrary statements of Mr. Fong.

Mr. Morgan said the rezoning would make the parking better. He said Mr. Fong told him that redesigning the parking lot could cure the parking shortage. Mr. Morgan took the attitude that this shortage was not germane at the stage of approval of rezoning. He said investigation at the development permit stage would resolve the parking issue. Mr. Morgan said that if parking were, in fact, short, the development office would not grant a development permit.

Following Laba, the Board read both the M.P.S. and the L.U.B. for Cole Harbour/Westphal as it affects the present application. The M.P.S. is before the Board as Exhibit F-8 and the L.U.B. for Cole Harbour/Westphal is Exhibit F-9. The Board in Schedule "A" to this decision quotes some extracts from the M.P.S. and also from the L.U.B.

The subject land falls in the Generalized Future Land Use Map portion of Exhibit F-8 (Gen. FLUM) under Community Commercial designation.

Policy P-49 establishes Council's intention to encourage commercial growth in the Community Commercial designation.

Policy P-92 establishes that all land shall not be prezoned. It provides that Council may be consider rezoning by amendment to the Zoning By-Law.

Policy P-92(iii) within the Community Commercial designation encourages commercial uses between 10,000 and 20,000 square feet in accordance with policy P-51.

Policy P-93 requires Council, on amendments to the Zoning By-law, to consider whether or not the proposal fits the M.P.S.'s intent. Council must consider whether the proposal meets with the requirements of all other municipal by-laws and regulations. It requires that controls over the proposed development reduce any conflict with adjacent or nearby land uses. Council must concern itself with, among other things, parking.

Policy P-98 says Council should provide additional controls over development by fully enforcing the by-laws of the

County.

The Board has set out above the previously decided cases cited to the Board by Mr. MacDonald and particularly the Carey case. Excerpts from the Fournier case and a number of City of Sydney cases warned councils against acting contrary to the staff advice. Those cases presupposed that staff advice correctly interpreted and set out the intent of the M.P.S. in that advice.

Mr. Morgan delivered his opinion that this development fulfilled the intent of the M.P.S. With respect, the Board believes him wrong.

It is clear from the M.P.S. that on a rezoning amendment Council must consider the proposal.

The proposal in this case was that Fong's Restaurant Limited, to expand, needed the square footage commercial rezoning to accommodate additional parking.

Nothing in the proposal showed underground parking, roof-top parking or a new parking structure on the lot.

Short of these extreme measures, the combined land could not remotely meet the proposed inherent parking requirements. Mr. Morgan admitted this gave him concern when he first saw the proposal. It must have caused him concern when he visited the site. He based his advice on the dual premises that the Applicant could somehow arrange parking. Failing that, it was not his function, but the function of the development officer, to stop the proposal later.

Clearly an applicant does not have to work out all the details of his proposal when he applies for a rezoning amendment. Fine details of Building By-law requirements such as colour of shingles, detailed engineering specifications, e.g., await Development Officer scrutiny after completed rezoning.

Obvious general specifications, as in Laba, command Council's attention at the proposal's rezoning stage. Mr. Morgan was wrong in his failure to address adequately parking at the rezoning application stage.

Before rezoning, Council must consider the general proposal. Mr. Morgan's advice to Council was not sufficiently complete to aid Council.

Mr. MacDonald went on to argue that Council did not follow Mr. Morgan's advice. He said Council's decision followed improper changes of mind by the local councillor in the area. (The Board takes the meaning of "improper" in this context to mean "founded on reasons other than the intent of the M.P.S."). Mr. MacDonald alleged the Minutes showed Councillor Mont had no rational basis to persuade Council to decide against the rezoning.

The Board makes no comments on the apparent change of mind of Councillor Mont, as he then was, between the P.A.C. meeting and the Council meeting. It does not presume to judge why he apparently changed his mind.

Mr. Cragg conceded Council Minutes mentioned no M.P.S. policies. He argued they mentioned parking. Mr. Cragg argued, even if Council had decided for the wrong reasons to reject the rezoning, its decision fit within the M.P.S. According to Mr. Cragg, the Board should still confirm its decision. If that decision fell within the intent of the M.P.S. on the evidence, then the Board must uphold and confirm Council's decision.

The Board agrees Mr. Cragg is correct on the first point that the Minutes mentioned parking. Council had to consider parking as a prime requirement under the M.P.S. in relation to the proposal. The Board must consider parking too. The L.U.B. specifies the parking requirements. This proposal lacked both handicapped parking spaces and ordinary parking spaces.

There is enough evidence before the Board to decide the decision of Council reasonably falls within the intent of the M.P.S. under Section 63(3) of the **Planning Act**. Therefore, under Section 63(4)(a) of the **Planning Act**, the Board confirms the decision of Council.

The Board dismisses the appeal.

It will issue an Order accordingly.

DATED at HALIFAX, Nova Scotia, this 2nd day of December, A.D., 1988.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

SCHEDULE "A"

EXCERPTS FROM EXHIBIT F-8, MUNICIPAL DEVELOPMENT PLAN FOR COLE HARBOUR/WESTPHAL (M.P.S.) and EXHIBIT F-9, ZONING BY-LAW FOR COLE HARBOUR/WESTPHAL (Land Use By-law

[page 8]

> "**Existing Land Use**
>
> ...
>
> Commercial uses are found along...the Cole Harbour Road...Businesses on the Cole Harbour Road provide goods and services moreso to the immediate community, including banking and financial services, a Nova Scotia Liquor Commission store and a number of restaurants, speciality [sic] shops and offices."

[page 11]

> "**Commercial Development**
>
> Commercial development on the Cole Harbour Road...has occurred largely in the absence of zoning controls. This has led to problems and community concern regarding standards for parking and access, outdoor storage and commercial signage. Although there is support for the growth of commercial services in the area, residents are concerned about the scale of new developments and their effects on neighbouring residential areas."

[page 24]

> "P-21(a)
>
> ...As much commercial traffic as possible should be directed to the Cole Harbour Road...Concern with residential environments will require greater control when these situations arise.
>
> P-21(b)
>
> It shall be the intention of Council to require commercial and high density residential uses within the C-2 Zone to access only onto the Cole Harbour Road, Cumberland Drive or Forest Hills Drive...".

[page 28]

> "**LAND USE INTENT**

...the Designations of the Generalized Future Land use Map (Map 1) as follows:

...Community Commercial...

The intent of the Community Commercial Designation is to encourage the creation of a commercial area along the Cole Harbour Road. The Designation supports a range of development in terms of goods and services, but limits the scale of commercial uses and discourages the [page 29] use of outdoor storage and display. Provision is made for larger commercial uses and certain intensive uses such as fast food restaurants to be considered by specific agreements respecting their particular needs and effects [sic] on adjacent residential areas."

[page 42]

"**COMMUNITY COMMERCIAL DESIGNATION**

As discussed in Section II, the Cole Harbour Road has developed as a commercial area which principally serves the local community. As the population of the area is expected to continue to grow, provisions can be made for the future development of commercial and higher density residential uses which will provide a focus for the community.

The Community Commercial Designation extends along both sides of the Cole Harbour Road from the City of Dartmouth boundary to the intersection of the Bissett Road. Because the majority of the lands within this Designation are undeveloped and in most cases share rear lot lines with the existing residential neighbourhoods, larger commercial and multiple unit residential developments may be considered by means of development agreements so as to ensure that the size of the use is appropriate, adequate separation is maintained from the existing residential areas and buffering is provided between the commercial and residential uses. In addition, specific developments such as taverns and fast food restaurants, which may result in conflicts with residential neighbourhoods are subject to specific controls.

...

P-49 It shall be the intention of Council to encourage the growth of commercial and community developments which serve the local area and create a community focus, by establishing the Community

Commercial Designation as shown on the Generalized Future Land Use Map (Map 1).

[page 43]

P-50 Within the Community Commercial Designation, it shall be the intention of Council to establish a commercial zone which permits commercial retail, service and office uses as well as higher density residential uses containing no more than twelve dwelling units and community and institutional facilities. General commercial uses shall be limited to a maximum of ten thousand (10,000) square feet of floor area."

[page 44]

"...Drive-in, take out and other fast food restaurants, can have a negative effect on abutting resident neighbourhoods, particularly due to the generation of significant volumes of traffic beyond normal business hours. Specific development agreements may accommodate the needs and effects of such uses.

P-53 ...permitting fast food restaurants...and drive-through service lanes, parking areas and refuse storage areas relative to adjacent residential neighbourhoods, and to the buffering of the use from adjacent residential properties."

[page 68]

IMPLEMENTATION

In accordance with Section 19(1) of the **Planning Act**, the adoption of this Municipal Development Plan does not commit Council to undertake any of the projects or actions contained, however, Council cannot take any action within the scope of this Plan which would, in any manner, be inconsistent with the Plan or at variance with it.

The measures which Council may investigate to implement the Plan are not restricted to those which are specified. In addition to employing specific by-laws and regulations, Council may encourage certain administrative procedures in response to implementation of this Plan and the Plan Area in relation to the Municipality as a whole...

The following policies include the basic requirements for proper implementation based on the policies of the

Plan...and the full and consistant [sic] enforcement of general by-laws and regulations of the Municipality.

P-86 This Municipal Development Plan shall be implemented by means of powers conferred upon Council by the **Planning Act**, the **Municipal Act** and such other Provincial statutes as may be applicable.

P-87 In addition to employing specific implementation measures it shall be the intention of Council to maintain an ongoing monitoring and planning process through its Planning Advisory Committee.

[page 69]

P-88 It shall be the intention of Council to require amendments to the policies and maps of this Plan under the following circumstances:...

(ii) where a request for a zoning amendment which is not permitted is made and subsequent studies show that the policies of the Plan should be amended...

P-90 In accordance with Section 20 of the **Planning Act**, this Plan may be reviewed when the Minister of Municipal Affairs or council deems it necessary, but in any case not later than five years from the date of its coming into force or from the date of its last review.

P-91 Providing that the intentions of all other policies are satisfied, Council may, for the purpose of providing for the [page 70] development of similar uses on properties which abut one another, consider the following amendments to the zoning by-law, for lands which are located where any land use designations abut one another, as shown on the Generalized Future Land Use Map (Map 1):

(i) amendments within a designation to provide for the development of uses which are uses permitted within the abutting designation; or

(ii) amendments within a designation to provide for the development of uses which are uses permitted by the zone on the abutting property within the abutting designation.

P-92 It is not intended that all land shall be prezoned for specific uses. Rather, in order to give Council a greater degree of control, the Plan provides that certain land uses shall be considered only as amendments to the zoning by-law...Such amendments...shall be considered only if they meet the policies found within the Municipal Development Plan. The following uses shall only be considered by amendment to the zoning by-law and:...

[page 72]

(iii)within the Community Commercial Designation:

(a) commercial uses with greater than 10,000 square feet and no more than 20,000 square feet of floor area according to Policy P-51;

(b) drive-in, take out or cafeteria type restaurants according to Policy P-53;...

[page 73]

...

P-93 In considering amendments to the zoning by-law...in addition to all other criteria as set out in various policies of this Plan...

(i) that the proposal is in conformity with the intent of this Plan and with the requirements of all other municipal by-laws and regulations;

(ii) that the proposal is not premature or inappropriate by reason of:

...

(d) the adequacy of road networks leading or adjacent to or within the development; and

...

(iii)that controls are placed on the proposed development so as to reduce conflict with any adjacent or nearby land uses by reason of:

(a) type of use;

(b) height, bulk and lot coverage of any proposed building;

[page 74]

(c) traffic generation, access to and egress from the site, and parking;

(d) open storage;

...

(f) any other relevant matter of planning concern.

(iv) that the proposed site is suitable in terms of steepness of grades, soil and geological conditions, locations of watercourses, potable water supplies, marshes or bogs and susceptibility to flooding.

P-94 In considering amendments to the zoning by-law or development...Council shall hold a public hearing according to...

[page 75]

P-98 It shall be the intention of Council to provide further controls over development by fully enforcing the following by-laws:

(i) the Building By-law;

(ii) the Unsightly Premises By-law;

...

(viii)the Occupancy Permit By-law.

P-99 In accordance with Section 43(1) and 49(4) of the **Planning Act**, the Development Officer appointed by Council shall administer the zoning by-law and the subdivision by-law and grant development permits."

EXCERPTS FROM THE ZONING BY-LAW - EXHIBIT F-9

ZONING BY-LAW FOR COLE HARBOUR/WESTPHAL

"A By-law to regulate the use of land...to regulate the height, bulk, location, size, spacing, character and use of buildings and structures within the Cole Harbour/Westphal Plan Area...

...no development shall be undertaken where a zoning by-law passed under this Act is in effect unless a development permit issued by the development officer has been obtained...

...development includes any erection, construction, addition, alteration, replacement or relocation of or to any building or structure and any change or alteration in the use made of land, buildings or structures...

[page 3]

PART 2: DEFINITIONS

In this By-law the word "shall" is mandatory and not permissive....The word "used" shall include "intended to be used", "arranged" and "designed"...

...

2.4 ALTERATION means any change in the structural component or any increase in the volume of a building or structure.

...

[page 4]

2.8 BUILDING means any structure whether temporary or permanent, used or built for the shelter, accommodation or enclosure of persons, animals, materials or equipment and includes any vessel or container used for any of the foregoing purposes.

...

2.14 DEVELOPMENT OFFICER means the officer of the Municipality of the County of Halifax, from time to time charged by the Municipality with the duty of administering the provisions of this By-law.

...

[page 5]

(c) Dwelling, Single Unit means a building which is a completely detached dwelling unit and having a minimum width of any main wall of not less than twenty (20) feet (6.1 m.).

[page 7]

...

2.32 LOT LINE

(a) Lot Line means a boundary or exterior line of a lot.

...

[page 8]

...

(c) Rear Lot Line means the lot line farthest from or opposite to the front lot line.

...

2.34 MAIN BUILDING means the building in which is carried on the principal purpose or purposes for which the building lot is used.

...

[page 9]

...

2.44 PARKING LOT means a building or structure or part of a building or structure or an open area containing parking spaces, other than a street, for two or more motor vehicles, available for public use or as an accommodation for clients, customers or residents and which has adjacent access to permit ingress or egress of motor vehicles to a street or highway by means of driveways, aisles or manoeuvring areas where no parking or storage of motor vehicles is permitted.

2.45 PARKING SPACE means an area of not less than one hundred sixty (160) square feet (15 sq. m.), measuring eight (8) feet (2.4 m.) by twenty (20) feet (6.1 m.), for the temporary parking or storage of motor vehicles, and which has adequate access to permit ingress and egress of a motor vehicle to and from a street or highway by means of driveways, aisles or manoeuvring areas.

...

[page 10]

...

2.53 RETAIL STORE means a building or part of a building in which goods, wares, merchandise, substances, articles or things are offered for sale directly to the public at retail value.

...

[page 11]

...

2.62 YARD means an open, uncovered space on a lot appurtenant to a building...

[page 12]

PART 3: ZONES AND ZONING MAPS

3.1 ZONES

For the purpose of this By-law, the Cole Harbour/Westphal area is divided into the following zones, the boundaries of which are shown on the attached zoning schedules...

	Symbol	Zone
Residential Zones	...	
	R-1	Single Unit Dwelling Zone
	...	
Commercial Zones	...	
	C-2	General Business Zone
	...	

3.2 ZONING MAPS

(a) Schedules...C...

(b) The extent and boundaries...C...

(c) ...C...appropriate zones...

[page 13]

...

3.4 ZONES NOT ON MAPS

The zoning maps of this By-law may be amended to utilize any zone in this By-law...Such amendments must be carried out in accordance with Sections 38 and 39 of the Planning Act...in conformity with the policies of the Municipal Development Plan for Cole Harbour/Westphal.

3.5 USES PERMITTED

Uses permitted within any zone shall be determined as follows:

(a) If a use is not listed as a use permitted within any zone, it shall be deemed to be prohibited in that zone...

[page 15]

PART 4: GENERAL PROVISIONS FOR ALL ZONES

4.1 DEVELOPMENT PERMITS

(a) No development shall be permitted unless a development permit has been issued and no development permit shall be issued unless all the provisions of this By-law are satisfied.

...

4.2 LICENCES, PERMITS AND COMPLIANCE WITH OTHER BY-LAWS

(a) Nothing in this By-law shall exempt any person from complying with the requirements of the Building By-law or any other by-law in force within the Municipality, or to obtain any licence, permission, permit, authority or approval required by any other by-law of the Municipality or statute and regulation of the Province of Nova Scotia.

(b) Where the provisions in this By-law conflict with those of any other municipal or provincial regulations, by-laws or codes, the higher or more stringent requirements shall prevail.

...

[page 17]

...

4.12 ACCESSORY USES PERMITTED

Where this By-law provides that any land may be used or a building or structure may be erected or used for a purpose, the purpose includes any use accessory thereto.

...

[page 20]

...

4.27 PARKING REQUIREMENTS

(a) For every building or structure to be erected or enlarged, off-street parking located within the same zone as the use and having unobstructed access to a public street shall be provided and maintained in conformity with the following schedule, except where any parking requirement is specifically included elsewhere in this By-law. Where the total required spaces for any use is not a whole number, the total spaces required by this Section or by other specific sections shall be the next largest whole number.

[page 21]

Use	Parking Requirement
Any dwelling except as specified below	1 space per dwelling unit
...	
Retail stores...	
a) exceeding 5,000 square feet...	5.5 spaces per 1,000 square feet...
b) not exceeding 5,000 square feet...	3.3 spaces per 1,000 square feet...
...	
Restaurants	1 space per 5 seats
Drive-in Restaurants	25 spaces plus 1 space per 5 seats
Licensed restaurants, lounges, taverns and	the greater of 1 space per 3 seats or 1 space

beverage rooms	per 100 square feet (10 sq. m.) of gross floor area

...

[page 22]

...

Any use not specified above	3.3 spaces per 1,000 square feet (93 sq. m.) of gross floor area.

[page 22(a)]

(b) Reserved Spaces for the Mobility Disabled

Notwithstanding Section 4.27 (a) above, reserved parking spaces for the mobility disabled shall be provided as an addition to the required spaces in conformity with the following schedule:

...

Restaurants and Theatres.	1 reserved parking space per 50 seats to a maximum of 10.
All other uses...	1 reserved parking space the mobility disabled per 15-100 parking spaces required; 1 additional space for each additional 100 required spaces or part thereof, to a maximum of 10.

(c) Standards for Mobility Disabled Parking Spaces

(i) each reserved parking space shall contain an area of not less than two hundred and forty (240) square feet measuring twelve (12) feet by twenty (20) feet;

(ii) where the limits of the parking lot are defined by a curb, the parking lot shall be provided with a ramped curb as close as possible to the location which it is intended to serve and in no case shall it be further than three hundred (300) feet from the location which it is intended to serve;

(iii)each reserved parking space shall be located as close as possible to the location it is intended to serve;

(iv) each reserved parking space shall be clearly identified by a ground sign.

[page 23]

4.28 STANDARDS FOR PARKING LOTS

Where a parking lot for more than four (4) vehicles is required or permitted:

(a) the lot shall be maintained with a stable surface that is treated to prevent the raising of dust or loose particles;

...

(d) the lot shall be within three hundred (300) feet (91.4 m.) of the location which it is intended to serve and shall be situated in the same zone;

...

(f) approaches or driveways to the lot shall be defined by a curb or concrete or rolled asphalt and the limits of the lot shall be defined by a fence, curb or other suitable obstruction designed to provide a neat appearance; in addition, the location of approaches or driveways shall be not closer than fifty (50) feet (15.2 m.) from the limits of the right-of-way at a street intersection;

(g) entrance and exit ramps to the lot shall not exceed two (2) in number and each such ramp shall be a width of twenty-five (25) feet (7.6 m.) at the street line and edge of pavement; and

(h) the width of a driveway leading to a parking lot or loading space, or of a driveway or aisle in a parking lot, shall be a minimum width of ten (10) feet (3 m.) if for one-way traffic and a minimum width of twenty (20) feet (6.1 m.) if for two-way traffic, and the maximum width of a driveway shall be twenty-five (25) feet (7.6 m.).

...

[page 24]

...

4.3 Road Entrance Reserves

Notwithstanding the lot frontage provisions contained in this By-law, a portion of a lot identified as a road entrance reserve shall meet the requirements of the provincial Department of Transportation.

[page 21]

PART 7: R-1 (SINGLE UNIT DWELLING) ZONE

7.1 R-1 USES PERMITTED

...

Residential Uses

Single unit dwellings;

...

[page 50]

PART 16: C-2 (GENERAL BUSINESS) ZONE

16.1 C-2 USES PERMITTED

...

Commercial Uses

Retail stores;

...

Restaurants except drive-in or take-out restaurants;

...

Residential Uses

Existing dwellings;

...

[page 51]

...

16.4 OTHER REQUIREMENTS: COMMERCIAL USES

Where uses are permitted as Commercial Uses in any C-2 Zone, the following shall apply;

(a) No open storage or outdoor display shall be permitted.

(b) No portion of any lot shall be used for the collection and storage of refuse unless the refuse containers are screened.

(c) No portion of any parking space shall be located in any required rear yard.

...

[page 52]

...

Minimum Rear or Side Yard	1/2 the height of the main building

...

[page 65]

PART 24: ADMINISTRATION

24.1 ENFORCEMENT

This By-law shall be administered by the Development Officer.

..."

TIDEWATER AND ANNAPOLIS BASIN PULP AND POWER v. TOWN OF BEDFORD

PLANNING - L.U.B. AMENDMENT - AGGRIEVED PERSON - EXTRACTIVE INDUSTRY - AMENDMENT TO DEFINITION SECTION OF L.U.B. - WHETHER DECISION OF COUNCIL REASONABLY CARRIES OUT THE INTENT OF THE M.P.S. - PLANNING ACT SS. 54(1)(e); 63(1)(a); 63(1A); 63(3); BEDFORD M.D.P. (M.P.S.) POLICIES; ENVIRONMENTAL HEALTH (f); E-13.

T bid to supply the rock for local development corporation, which had a large infill project on the margin of Bedford Basin. A owned land which contained sufficient rock for T's purposes and it agreed to sell the necessary rock. The quarrying process would make A's land suitable for development as industrial land. T attended the Town Office to apply for blasting and excavation permits. The planner suggested that T go by a development agreement approach. T did not file its applications. Meanwhile the Town passed an amendment to its L.U.B. which added the definition of "extractive industry" which, if valid, would allow the Town to control or prevent the quarrying here proposed. T contended it would have persisted in its blasting permit application and excavation permit application if it had not been distracted by the planner. Town contended T and A were not aggrieved persons.

HELD: The Board allowed the appeal and reversed the decision of Council amending the L.U.B.

The owner of the land clearly subject to an L.U.B. amendment when its use of the land may be affected by the by-law is an aggrieved person under the meaning of Section 63(1)(a). A is the owner of the land. T holds a licence to quarry it. Both are aggrieved persons. The Board is satisfied that the intention of Town to rezone was not specifically drawn to T's attention.

The Board is not determining the merits of the development of a rock excavation operation on A's land. The issue is restricted to whether or not the amendment to the L.U.B. is reasonably within the intent of the M.P.S. In 1982 when B adopted its M.P.S. it felt it did not have authority to regulate excavation. In 1983, Planning Act amended to allow Town, WHERE THE M.P.S. SO PROVIDES, to regulate excavation. At the time the Minister approved the M.P.S. he could not interpret Policy E-13 as regulating excavation. Before the Town can amend its L.U.B. to regulate excavation it must amend its M.P.S.

NSMB-20-88-P

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Planning Act, S.N.S., 1983, c. 9, as amended, by **TIDEWATER CONSTRUCTION COMPANY and ANNAPOLIS BASIN PULP AND POWER COMPANY LIMITED** from a decision of the Council of the **TOWN OF BEDFORD**, made August 15, 1988, which decision amended the Town's Land Use By-law by introducing the definition of "Extractive Industry" for the expressed purpose of prohibiting the establishment of "Extractive Industry" except by development agreement.

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: ROBERT GRANT, LL.B., and DAVID FARRAR, LL.B., for the Appellants;

PETER McINROY, LL.B., for the Town of Bedford;

MICHAEL WOOD, for the Interested Person, Susan Anne Paddick;

HEARING DATES: November 21st, 22nd and 28, 1988.

DECISION DATE: December 16, 1988.

DECISION: **Appeal Allowed.**

DECISION

In 1983 the Provincial Government established the Bedford Waterfront Development Corporation ("BWDC"). Its members are appointed by the Governor-in-Council. Among its objects is the development of the waterfront in Bedford. It is not a Crown Corporation. It is a separate entity from the

Municipal Council of the Town of Bedford.

Among the projects being pursued by the BWDC is an infilling project along the shores of the Bedford Basin. In the spring of 1988 the BWDC sought tenders for rock fill. One of the companies who submitted a tender was Tidewater Construction Company ("Tidewater"), an Appellant in this Appeal. Tidewater submitted the lowest bid and it appeared that it would receive the tender. Unlike some construction companies, Tidewater does not own a quarry site from which it could excavate and haul rock to the Bedford waterfront.

Tidewater entered into negotiations with Annapolis Basin Pulp and Power Company, ("Annapolis") the second Appellant, to remove rock from land owned by Annapolis. The land is located in Bedford off the Hammonds Plains Road near the Atlantic Acres Industrial Park. It is undeveloped. Annapolis had considered developing the land as an industrial park but the cost of removing rock and levelling the land is prohibitive. Under the proposed agreement, Tidewater would remove the rock and leave the land in a state which could then be developed into an industrial park. Burnnside Industrial Park in Dartmouth developed in a similar manner. The intended duration for removal of the rock is two years.

The land in question is near the Peerless Subdivision. Some residents in this subdivision experienced problems caused by blasting for Atlantic Acres Industrial Park. They are concerned that the blasting required to excavate the rock will further damage their homes, water quality and quantity and their quality of life. They are also concerned about traffic problems with the trucks travelling along the Hammonds Plains Road from the site to the waterfront and back.

On the afternoon of Friday, May 6, 1988 Robert Bayard, manager of Tidewater, met with Town Officials, Barry Zwicker, Director of Planning and Development Officer and John Malcolm, Senior Planner. Mr. Bayard advised them of the company's plans respecting the removal of rock fill from the Annapolis site to the waterfront. Mr. Bayard was told that the Town would require environmental assurances from both the Federal and Provincial Departments of Environment. Town Staff also said that it might be necessary to obtain a development agreement which would require a public hearing process.

Mr. Zwicker was leaving on a six-week course and Mr. Malcolm assumed responsibility for this matter. On Monday, May 9, 1988, Mr. Malcolm sent a memo to Dan English, Chief Administrative Officer for the Town, outlining the proposal and suggesting two options for proceeding.

The first option was to permit the rock removal to proceed with some staff input into the scheduling of the project and the resolution of any traffic issues. The second option was to consider the rock removal as a "quarry" operation and require a development agreement. The tenor of the memo, in the Board's opinion, favoured the first option.

According to Mr. Malcolm, his memo was discussed with some of the members of Council on the evening of May 9th. Council Minutes do not refer to this informal discussion. Mr. Malcolm said they decided that the Town's position would be that a development agreement was required. One of the Councillors who took part in this discussion was Councillor Nolan.

On June 1, 1988, the Bedford Planning Advisory Committee ("BPAC") met and a motion was made respecting the issuing of a blasting permit to Tidewater. The Minutes quote Councillor Nolan, Chairman of BPAC, as follows:

> "1. Quarrying is not addressed in the MPS and can not be controlled by zoning according to the provincial planning act. Grades may be altered and a permit for blasting may be issued by the Town Engineer. The blasting permit may have attached specifications and limitations.
>
> 2. The potential increased volume of truck traffic has not been addressed and most of the roads used would be provincial highways and the town has no right to limit their use.
>
> 3. The Town has little legal power to do anything unless perhaps by persuasion, i.e., ask BWD to place limitations and specifications when they award the contract.
>
> 4. Tenders have been called; no tender had been awarded; and no application had been made for a blasting permit."

The Board asked Mr. Malcolm why Councillor Nolan stated that the M.P.S. did not require a development agreement when he had been in attendance at the May 9th discussion. Mr. Malcolm stated he believed Council obtained legal advice which reflected the opinion expressed by Mr. Nolan.

On the night of June 13, 1988, the Town held its semiannual Town Meeting at which residents can discuss with Town Councillors and Staff various matters of concern. At the meeting the issue of a possible quarry in the Town was raised.

Albert Chiasson, Vice-President of Development for Annapolis spoke at the meeting. He advised that Annapolis was negotiating with Tidewater to allow Tidewater to remove rock from the site. He testified before the Board that he was very open at the meeting and that Annapolis had nothing to hide.

Representatives of BWDC were not in attendance at this meeting. There was apparently a high degree of frustration on the part of the residents in attendance that they could not get full answers from Town Staff as to the intentions of the BWDC. Staff did not have the answers because the BWDC had not kept them informed.

Council held an emergency Council Meeting the following morning, June 14, 1988, at 8:30 a.m. The Minutes state that the purpose was:

> "to receive and take any appropriate action with respect to a report...into what planning controls Town Council may be able to implement with respect to any possible proposals for a quarrying or rock extraction operation in the Town."

Mr. McInroy, Solicitor for the Town and Mr. Malcolm reviewed a proposed two-step process. The Minutes described these steps as follows:

> "The first step would be to take the view that a large rock extraction operation is, in fact, an industrial use. With this view, Town Council could require an applicant to enter into a Development Agreement process prior to any such activity being undertaken.

> The second step would be for Council to clarify the definition of a large commercial extraction operation by adding a specific definition to the Land Use By-law. The addition of a definition for extractive industries would augment the position undertaken in the first step. This would not require an amendment to the M.D.P. by virtue of Policy E-13(b)."

> Council unanimously carried the following motion:
>
> "WHEREAS the public has expressed its concern that quarrying or extractive industries not be located within the Town of Bedford without an opportunity for public participation through the Public Hearing process; and
>
> WHEREAS Council wishes to clearly indicate that extractive industries, of a commercial nature, are considered to be industrial uses and shall only proceed by way of Development Agreement;
>
> BE IT THEREFORE RESOLVED that the Council of the Town of Bedford serve notice of its intention to amend the Land Use Bylaw to include the following definition:
>
> > "Extractive Industry" means a commercial operation involving the altering of land, or the removal of soil or other materials from the land, excepting the work of landscape companies, and shall be deemed to be an industrial use."

Later on the morning of June 14, 1988, Mr. Bayard attended at the Town's Office with the intention of making application for a blasting permit and a permit to excavate and extract rock. When he approached the counter he was told that Mr. Malcolm wished to speak to him. He met with Mr. Malcolm and they discussed the situation and they agreed to a meeting between their superiors. Mr. Bayard left the office and because of this further meeting did not file the application for the permits.

There is a conflict between the evidence of Mr. Bayard and Mr. Malcolm about whether or not Mr. Malcolm advised Mr. Bayard that Council had passed the motion giving their intention to amend the by-law.

Mr. Malcolm prepared a Memo for his file relating to the meeting with Mr. Bayard. It states, in part, as follows:

> "I then asked Mr. Bayard how he felt about proceeding through a development agreement process rather than simply applying for some permits. I noted that from a planning perspective it would be best for all if we were able to set up a process whereby the public could be involved. This, I suggested, would help alleviate ungrounded fears that would surely result from a lack of a public input process. Mr. Bayard expressed some reservations but indicated that he would be willing to give it further consideration."

In the middle of the next paragraph of the memo, Mr. Malcolm states:

> "I mentioned to him that Council had in fact met earlier this morning to pass a resolution stating their intent to amend the Land Use By-law by better defining what an extractive industry would be."

Mr. Bayard denies that this was told to him. Given the way the memo is phrased, it appears that this fact was mentioned in passing. The Board is satisfied that it was not specifically drawn to Mr. Bayard's attention. Had it been, the Board has no doubt that Mr. Bayard would have filed the applications that day.

On June 15, 1988, a Notice of Intention to Amend the Bedford Land Use By-law appeared in the Mail Star.

On June 16, 1988 Mr. Bayard, George Coulter of Tidewater, Mayor Keith Roberts and Councillor Christie met to discuss the matter. Mr. Malcolm joined the meeting. He testified that Mr. Bayard was obviously upset.

Later on the 16th, Mr. Bayard filed the applications for the permits together with a letter to Rick Paynter, Director of Engineering and Works, requesting that the applications be considered as having been submitted on June 14, 1988.

A public hearing respecting the proposed by-law amendment was held on July 11, 1988. On August 15, 1988, Council passed the amendment.

The effect of the by-law amendment is to require commercial operations which intend to excavate rock or otherwise alter the land to enter into a development agreement with the Town.

At the start of the hearing of this appeal, Michael Wood made application on behalf of Susan Anne Paddick to participate in the hearing under Section 27(4) of the Municipal Board Act. The Board ruled she had a real and substantial interest in the subject matter and permitted her to participate.

At the request of Mr. McInroy, the Town's Solicitor, the Board held a prehearing conference to consider whether or not the Appellants were aggrieved persons within the meaning of Section 63(1)(a) of the Planning Act. Mr. McInroy again raised the issue at the beginning of the hearing and the Board ruled that the Appellants were aggrieved persons. Mr. McInroy has raised the issue again in his brief.

While the by-law amendment applies to the whole town, the facts as set out in Mr. McInroy's brief make it clear that it was proposed and adopted:

> "As a result of rising concerns, among Town residents and Town Councillors, that Tidewater Construction Company Limited may attempt to establish a quarry on lands located within the Town of Bedford and owned by Annapolis Basin Pulp and Power Company Limited".

The Board is of the opinion that the owner of land clearly subject to a by-law amendment whose use of the land may be affected by the by-law, is an aggrieved person within the meaning of Section 63(1)(a). In his brief, Mr. McInroy referred to a number of cases decided before the introduction of Section 63(1A). These cases all deal with the situation of persons or organizations who lived adjacent to the land whose zoning had been amended. In this case the person appealing, Annapolis, is the owner of land to which the specific amendment will apply. Tidewater has a licence from Annapolis to use the land for a purpose which the by-law is attempting to regulate and as such is also an aggrieved person within the meaning of Section 63(1)(a).

Section 63(3) of the Planning Act requires the Board to determine whether Council's decision to amend the by-law reasonably carries out the intent of the Town's Municipal Planning Strategy ("M.P.S."). The Board may not allow the appeal unless it determines that the decision of Council cannot reasonably be said to carry out the intent of the municipal planning strategy.

In deciding this appeal, the Board is not deciding on the merits of the development of a rock excavation operation on lands owned by Annapolis. The issue before the Board is restricted to whether or not the amendment to the Land Use By-law is reasonably consistent with the intent of the M.P.S.

The Town's M.P.S. was adopted in 1982. Chapter 9 is entitled Environmental Health and Section (f) of that chapter reads as follows:

> "f) **Excavation and Filling**
>
> Bedford's topography is such that the development of the street system creates many lots that are either sloped away from the street or are well below the actual road level. These conditions lead to much infilling on the low side of streets and a substantial amount of excavation on the high side of the street. The scale of some fill and excavation operations is such that the impact is staggering both on the neighbours and often the entire community.
>
> Uncontrolled filling or excavating often leads to excessive runoff and siltation. Further, construction problems may be experienced due to the poor compaction quality of unsuitable fill.
>
> The **Planning Act** at present does not within the definition of "development" include excavation or filling operations. Therefore the Town will make representation to the Provincial Government to have the Act amended to include excavation and filling which will enable the Town to enact a by-law to regulate this activity.
>
> **Policy E-13:** It shall be the intention of Town Council to:
>
> a) Make representation to the Provincial Government to amend the **Planning Act** to include excavation and infilling within the definition of "development".
>
> b) If the Planning Act is amended Town Council shall through the development permit process regulate the excavation or filling of any land within the Town."

This section clearly states that at the time that the

M.P.S. was adopted, the Town felt it did not have authority to regulate the excavation or filling of any land within the Town.

The Board notes that the **Planning Act** was amended by Chapter 9 of the Statutes of Nova Scotia, 1983. While both the final report and recommendations of the Planning Act Review Committee and the **Planning Act**: A Working Paper in Legislative Form, contained a new definition of development in accordance with Policy E-13(a), this definition did not appear in the 1983 Act.

The 1983 Planning Act does however contain the following new provision:

> "54(1) Where a municipal planning strategy so provides, a land-use by-law may
>
> (e) regulate or prohibit the altering of land levels, the excavation or filling in of land, or the removal of soil or other materials from the land, unless these matters are subject to another enactment of the Province;".

Although the Town's M.P.S. has been amended since 1982, there has been no amendment to the section on Excavation and Filling or to Policy E-13, although section 54(1)(e) appears to provide for such an amendment.

The intent of Policy E-13 is to have the **Planning Act** amended to permit the Town to regulate the excavation or filling of any land within the Town through the development permit process. While the Act was not amended in the manner prescribed in E-13(a), it has been amended. Can E-13(b), therefore, be read to permit the Town to enact a by-law to regulate excavation of any land within the Town?

Section 54(1)(e) of the **Planning Act** requires that a M.P.S. contain a statement which would provide for the making of a land-use by-law to regulate excavation.

Before a M.P.S. comes into effect, in addition to the other procedural requirements, it must be approved by the Minister of Municipal Affairs. Any amendment to a M.P.S. must also be approved by the Minister. An amendment to the Land Use By-law does not require Ministerial approval. The Town's M.P.S. was approved in 1982. Section 54(1)(e) of the **Planning Act** was not passed until 1983. At the time that the Minister approved the M.P.S. he could not interpret Policy E-13 as authorizing the Town to regulate excavation. It was merely seeking authority to regulate excavation.

In the Board's opinion before the Town can amend the land-use by-law to regulate excavation pursuant to Section 54(1)(e), it must amend its M.P.S. to provide specifically for such a by-law. An amendment to the M.P.S. would outline the conditions under which Council may approve or reject an application for excavation. For example, the Town's M.P.S. gives specific details on the types of commercial uses, residential uses and institutional uses that are permitted.

In this case the Town did not amend its M.P.S. to provide for the making of a land use by-law to regulate or prohibit excavation. The purpose of the by-law amendment is to regulate excavation by defining excavation as an industrial use and require a development agreement.

The Board is not satisfied that the by-law amendment is reasonably consistent with the intent of the M.P.S.

The appeal is allowed and the decision of Council amending the Land Use By-law is reversed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 16th day of December, A.D., 1988.

Linda Garber

LINDA GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

PART

2

MUNICIPAL BOARD DECISIONS

VOLUME SEVEN-B/1988

PART II

Nova Scotia

Municipal Board

MEMBERSHIP OF NOVA SCOTIA MUNICIPAL BOARD

CHAIRMAN:	MICHAEL G. JOHNSON, C.A.
VICE-CHAIRMAN:	LINDA D. GARBER, LL.B.
MEMBER:	RICHARD L. WELDON
TERM O.I.C. APPOINTMENTS:	R.H. BLOIS, Q.C. ELIZABETH SALTON

****

DOREEN A. FRIIS — Clerk

CLYDE A. PAUL, LL.B. — Counsel

THIS VOLUME CONTAINS ALL PLANNING, MUNICIPAL BOUNDARIES AND OTHER DECISIONS (EXCEPT ASSESSMENT) FROM JANUARY 1, 1988, TO DECEMBER 31, 1988.

THESE DECISIONS ARE PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTER 9, STATUTES OF NOVA SCOTIA, 1981.

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RE: MUNICIPALITY OF THE COUNTY OF ANNAPOLIS

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-
MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

Council made an application requesting change. The Board had a hearing on December 4, 1987 and issued a preliminry order requiring a further application. On March 15, 1988, Council passed unanimously a resolution saying that there was no change requested. Some question was raised as to legality of the motion.

HELD: The Board rejected Couincil's application of no change. The Board increased the number of councillors by one and increased the polling districts by one,rearranging the boundaries of several polling divisions to accommodate this.

The Board increased the districts by one, the number of Councillors by one and accommodated these changes by having new boundaries made for Districts 2, 3, 9, 10, 11 and 12.

The Board will not comment on the legality of the second motion. The Board is satisfied that there is a community of interest in the proposed District 10. The size and isolation of District 10 is such that it is not appropriate to merge it with any other polling district. This justifies the below average voter-per-councillor ratio thus arrived at. Although there are a number of distinct communities of interest within the proposed district it is not desirable or advantageous to separate them at this point. This disposition most clearly meets, of the options presented, the desires of the areas expressed in A's original application.

The Board accepts variations from the norm in these circumstances. The Board recommends that Council, after the 1988 election, give consideration to setting up a committee to review all the polling districts.

NSMB-20-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S. 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE COUNTY OF ANNAPOLIS** for the approval of changes to the Number and Boundaries of the Polling Districts and the Number of Councillors to be elected from each Polling District.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE COUNTY OF ANNAPOLIS** (hereinafter referred to as the "Municipality") for the approval of changes to the number and boundaries of the Polling Districts in the Municipality and the number of Councillors to be elected from each, was first heard by the Board on December 4, 1987, after due public advertisement in The Annapolis Spectator and the Mirror Examiner, newspapers circulating in the area.

Following that hearing, the Board issued an order requiring the Municipality to:

> "Make a study of the existing Districts 9, 10 and 11 and prepare a proposed revision of the existing boundaries of Districts 9, 10 and 11 and a new District 12. The proposed boundaries are to reflect the community of interest of those persons residing in Polling Division 29, South Lawrencetown and others in the northeastern corner of District 10, ... and the separate community of interest of those persons residing in the southern half of District 10."

The Board held a second hearing on March 17, 1988, which was advertised in the Chronicle Herald and the Mirror Examiner to consider various options which the Municipality had proposed in response to the Board's Order. At the conclusion of the hearing the Board gave an oral decision with written reasons to follow.

The Municipality submitted its original application in June, 1987. The application stated that a study had been conducted by the Boundaries Committee which was initially comprised of the Warden and two other councillors. The Application states that because of the larger number of voters in Districts 10 and 11 it was proposed and accepted by Council that a new District 12 be created. The new District 12 was to comprise the eastern half of District 11 and the northeastern corner of District 10. According to the evidence presented at the first hearing, there had been a petition by some residents in the northeastern corner of District 10 requesting a change.

On October 2, 1987, the Board received a letter from the Municipal Clerk/Treasurer which stated that the Boundaries Committee had considered a petition from a group of citizens in the South Lawrencetown area requesting a further change to District 10. The Committee recommended to Council that no additional alterations be made but that the information including figures showing the effect of the redistribution be forwarded to the Board for informational purposes.

The Board's first hearing in the Municipality lacked direction in that there was no one designated to present the application to the Board. The solicitor for the Municipality, Bruce Gillis, had received no instructions from Council other than to attend and observe. He had signed the South Lawrencetown petition. The Warden, H. Corbert Sanford, was ill and not able to attend. The Councillor for District 10, Robert Mason, who had sat on the Boundaries Committee was making a separate presentation and did not feel that he could make the presentation on behalf of Council. Eventually the Municipal Clerk-Treasurer, Ronald Grant, testified and outlined Council's actions leading to the application.

Following this Councillor Mason testified. He stated that he had been the Councillor for District 10 for 30 years and was the former Warden of the Municipality. He noted that District 10 runs from the Lunenburg border to the Annapolis River and that the community of Springfield is only one mile from Lunenburg County and that most of the land between there and the northern part of District 10 is uninhabited and runs over South Mountain. He felt that the Springfield area had closer ties with Lunenburg

County than with Annapolis County, including schools. He indicated that he would be making an application to Council to have the Springfield area annexed to Lunenburg County.

Carol Daniels, a resident of South Lawrencetown, gave detailed evidence of why she and others felt that the South Lawrencetown area should be separated from District 10. She emphasized that there was no community of interest with Springfield but that there was a strong community of interest with Lawrencetown and other communities along the Annapolis River. Albert Smith, a Village Commissioner for Lawrencetown, also supported the view that South Lawrencetown be removed from District 10.

Both Councillor Russell Hamm for District 9 and Councillor Lorimer Joudrey for District 5 testified. Councillor Joudrey made it clear that not all Councillors had been provided with the information from the study and advised caution. Mr. Gillis also testified and suggested that the Board adjourn the hearing to a future date. After a short adjournment the Board called the Planner, Nick Lasch, to testify. Following his evidence the Board ended the hearing. The Board issued its first Order on December 9, 1987.

Following the issuing of the Board's first Order the Council met and determined that all Councillors should sit on the Boundaries Committee. They requested the Planner to prepare various options for their consideration and arranged to hold a public hearing as requested by the Board. The Planner presented 7 options to Council and an additional 4 or 5 options were also considered. The public hearing was held in Nictaux and approximately 20 to 25 residents attended. Council was unable to decide on a single option and recommended 3 options to the Board for consideration.

At the commencement of the Board's second hearing on March 16, 1988, the Warden testified that because of illness he had missed the various meetings of Council and the public hearing and had had little input into the final decision. He expressed the view that "if something works, don't fix it" and went on to advise the Board that on the previous day March 15, 1988, Council had passed a unanimous resolution as follows:

> "Council make recommendation to the Nova Scotia Municipal Board at the Public Hearing to be conducted on March 16, 1988, that the polling district boundaries for the Municipality of the County of Annapolis remain unchanged".

Some opinions were expressed at the hearing as to the legality of this motion. The Board will not comment on the legality of the motion but notes that the Council included in the original application filed in June 1988, a copy of a resolution passed by Council requesting an amendment to the boundaries. The application was signed by both the Warden and the Municipal Clerk/Treasurer. It was suggested by Councillor Joudrey that the Board consider this new motion as a 4th option.

Following testimony by the Warden, Councillor

Mason testified that he was no longer pursuing annexation to Lunenburg County and did not support any changes to District 10.

Councillor Smith for District 3 testified that the notice of the Public Hearing had not made reference to the fact that District 3 would be affected by the various proposals and was opposed to any change.

Mr. Lasch was requested to testify by the Board and he reviewed the three options which Council had forwarded to the Board. Option 1A provides for a separate district, District 11, for the Village of Lawrencetown and its surrounding communities of interest. The new District 11 would comprise the northwestern corner of District 10, a small portion of District 9 (Paradise Brook), a portion of District 3 (Lawrencetown), a small portion of District 2 (Brickton) and a part of the old District 11. A new District 12 would comprise the remainder of the old District 11 and the northeastern corner of District 10. None of the other six districts would be effected.

Option 2A which was proposed by Councillor Joudrey had a much greater impact on the existing districts. This option would also include Lawrencetown and the surrounding communities of interest in a new District 12 together with the northwestern portion of the existing District 11. The borders between Districts 8, 9 and 10 would be adjusted to remove the community of West Dalhousie and surrounding area from District 9 and include it in District 10. The northeastern area of District 10 would be included in District 11.

Option 3A would include the whole of the Village of Lawrencetown in District 3 but leave most of the surrounding communities in the new District 11. This new District 11 would also include the northwestern part of the old District 11, thereby splitting the communities of the Nictaux, Meadowvale area. A new District 12 would comprise the eastern half of the old District 11 and the northeastern corner of District 10.

Option 1A was supported by a number of the persons from the general public who testified at the hearing. Of these, three claimed that they had discussed the various options with others in the Lawrencetown area and had received a favourable response to Option 1A.

After careful review of the voter statistics and the various communities of interest involved, the Board believes that of the options presented, Option 1A is the most acceptable. In selecting Option 1A the Board is aware that it does create voter imbalances in Districts 10 and 12. The following voter statistics were provided:

EXISTING BOUNDARIES

DISTRICT NUMBER	NUMBER OF VOTERS	VARIATION FROM AVERAGE	PERCENTAGE VARIATION (%)
1	1,231	(32)	(2.53)
2	1,223	(40)	(3.16)
3	1,315	52	4.11
4	1,179	(84)	(6.65)
5	1,347	84	6.65
6	1,522	259	20.51

7	1,043	(220)	(17.41)
8	991	(272)	(21.53)
9	1,093	(170)	(13.46)
10	1,337	74	5.85
11	1,603	340	26.92

TOTAL: 13,884

AVERAGE: 1,263 (Voters per Councillor)

OPTION 1A (ESTIMATE)

DISTRICT NUMBER	NUMBER OF VOTERS	VARIATION FROM AVERAGE	PERCENTAGE VARIATION (%)
1	1,231	74	6.4
2	1,166	9	.8
3	943	(214)	(18.5
4	1,179	22	1.9
5	1,347	190	16.4
6	1,522	365	31.5
7	1,043	(114)	(9.8)
8	991	(166)	(14.3)
9	1,087	(70)	(6.1)
10	486	(671)	(58.0)
11	1,010	(147)	(12.7)
12	1,670	513	44.3
*TO BALANCE	209		

TOTAL: 13,884

AVERAGE: 1,157 (Voters per Councillor)

*In developing the new statistics, it was necessary to use a calculation of 1.9 voters per dwelling unit which resulted in a variance from the original total.

The Board is satisfied that there is a community of interest in the proposed District 10 which is quite separate from the community of interest of that part of the old District 10 which borders on the Annapolis River. The size and isolation of District 10 is such that it is not appropriate to merge it with any other polling districts.

The below average voter per councillor ratio is justified.

The proposed District 12 has an estimated 67 more voters than the old District 11. The ratio of voters to councillors has significantly increased due to the addition of one councillor. Although there are a number of distinct communities of interest located within the proposed District, it would not be desirable nor advantageous to separate them at this point. The Board notes that this District most closely meets the desires for the area expressed in the Municipality's original application. The Board is satisfied that the variation from the norm is acceptable in these circumstances.

The Board recommends that following the election in October, 1988, Council give consideration to appointing a Committee to review all of the polling districts in the Municipality.

The Board approves the new boundaries of the polling districts of 2, 3, 9, 10, 11 and 12 in the manner shown on Option 1A thereby increasing the number of Polling Districts to 12 and the number of Councillors elected therefrom to 12. When the Board has received the descriptions of the new polling districts, an Order will issue.

DATED at HALIFAX, Nova Scotia, this 23rd day of March, A.D., 1988.

Michael G Johnson

MICHAEL G. JOHNSON, C.A.,
Chairman.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD

RE: MUNICIPALITY OF THE COUNTY OF ANTIGONISH

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-
MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

Council applied for no change in the number of councillors and no change in the district boundaries except for the addition of Mattie Settlement annexed from the District of Guysborough since the last periodic review. Study shows that there was an average ratio of 1 councillor for 870 voters.

HELD: The Board approved the application and recommended a detailed review prior to the 1991 elections.

The Board adopted many of the phrases of the 1981 P.U.B. decision. It is difficult to balance representation by population with factors related to geography and community of interest. There is no hard and fast rule of how much the population of a polling district may deviate from the average. The ideal is to have each voting district with the same number of voters. Each citizen's vote is thus worth as much as each other citizen's vote. This ideal may legitimately be modified by taking into account geographical factors and clearly identified and long established communities of interest which should not be split up.

District 9 in A is considered by the Board as an unacceptable variation from more than thirty-three and one-third per cent from the average.

The Board, however, is prepared to accept the nature of existing polling districts and number of councillors with the addition of Mattie Settlement annexation to District 8.

The Board strongly recommends a review of the existing boundaries and drawing of a new set of boundaries which will result in a more equal distribution of voters prior to the 1991 election.

NSMB-21-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE COUNTY OF ANTIGONISH** for the confirmation of the Number and Boundaries of the Polling Districts and the Number of Councillors to be elected from each Polling District.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE COUNTY OF ANTIGONISH** (hereinafter referred to as the "Municipality"), for the confirmation of the number and approval of certain changes to the boundaries of the Polling Districts in the Municipality and the number of Councillors to be elected from each, was heard in Council Chambers in Antigonish on February 8, 1988, after due public advertisement in The Casket and The Reporter, two newspapers circulating in the Municipality.

Mrs. Jean MacPherson, Q.C., appeared as Counsel for the Municipality, together with Mr. Alan Bond, Municipal

Clerk. Warden A.Hyland Fraser and Councillors Colin B. Chisholm, Herbert J. DeLorey, Joseph Chisholm and William C. Durant also appeared.

The Municipality carried out a review of the number and boundaries of the polling districts and the number of councillors to be elected from each district. A review of the information indicates that between 1979 and 1985 there was growth in all districts except District 7 with an overall growth of 10% in the voters of the Municipality. District 4, represented by 2 councillors, is located next to the Town of Antigonish and experienced the greatest voter growth of almost 20%.

The Municipal Council passed a Resolution on December 15, 1987, requesting that the existing number and boundaries of the polling districts be confirmed. The Board notes that because of a previous decision of the Board the annexed area of Mattie Settlement/Grosvenor would fall in District 8 and is included in the request for confirmation.

The following are the voter statistics for the Municipality for the 1985 Municipal elections.

DISTRICT NO.	NO. OF VOTERS	VOTER VARIATION FROM AVERAGE	VOTER PERCENT VARIATION
1	698	-172	(19.8)
2	766	-104	(11.9)
3	707	-163	(18.7)
4 (2 councillors)	1906	+166	19.1
5	698	-172	(19.8)
6	989	+119	13.7
7	738	-132	(15.2)
8*	987	+117	13.4

9	1212	+342	39.3

TOTAL: 8701

AVERAGE: 870 (Voters per Councillor)

*The annexed area of Mattie Settlement/Grosvenor includes approximately 97 additional voters. Using 1985 figures this would adjust the variance for District 8 to 23.2%.

The Board is concerned with the degree of variation from the average number of electors in District 9. As expressed in many of the Public Utilities Board decisions during the last municipal boundaries review in 1981, it is often difficult to balance the principle of representation by population with factors related to geographic area and community of interest. In the P.U.B. decision dated December 24, 1981, on the application of the County of Pictou, the Board stated at page 4:

> "The Board has never attempted to lay down a hard and fast rule as to the extent to which the population of a polling district may deviate from the average. The ideal is to have each polling district with the same number of voters. Each citizen's vote is then worth the same as every other citizen's vote and representative government truly is representative. On the other hand, the Board considers that the representation by population principle may be legitimately modified to take account of geographical factors such as travelling distances between communities and clearly identifiable and well established communities of interest which should not be split up in order to achieve a theoretically perfect distribution of population.
>
> It is worth noting, however, that the Electoral Boundaries Readjustment Act of Canada requires that the population of Federal constituencies vary by no more than 25% from the average population for all constituencies in a Province and that the Nova Scotia Select Committee on Electoral Boundaries directed in 1978 that the population of each provincial constituency vary by no more than 33 1/3% from the average population

of all constituencies."

District 9 is above what the present Board considers an acceptable variation of 33 1/3% from the average voters per councillor.

The Board notes that the P.U.B., at page 5 of its decision dated January 14, 1982, on the previous application of the Municipality of the County of Antigonish, recommended:

> "...that at the next revision of Boundaries, Council consider whether it would be desirable to divide District No. 4 into two separate districts. It has been found in other areas that single member districts often work better in practice than dual member districts. Should the number of voters in District No. 9 continue to be greatly in excess of the average following the next municipal election, a study should be conducted with a view to revising the boundary between Districts 8 and 9 (and possibly Districts 7 and 8) so as to achieve a better distribution of voters."

District 4 is an area which borders and surrounds three sides of the Town of Antigonish and therefore would expect to experience the greatest growth, as previously noted. Testimony of the Warden, Hyland Fraser and Councillor Colin Chisholm, who is one of the Councillors representing District 4, indicated that this growth is expected to continue, as building lots in the Town are limited. The services presently provided in District 4 are provided by the Town and the Municipality has recently been told that the Town could not handle any more sewage.

This has caused the Municipality to have a new look at planning in this area and has put current development plans and subdivisions on hold. It was stated that it would be premature to divide District 4 until the planning problems are addressed and it is determined what the future development of the District is to be.

District 9 is an area located on the Strait of Canso and the Northumberland Strait and includes the communities of Havre Boucher, Linwood, Cape John and Aulds Cove. The bulk of the commerce of the District is centered in the Canso Strait area and its growth is directly affected by economy of that area.

The Board notes that the population variance for District 9 has decreased from an excess of 46.3% in 1979 to 39.3% in 1985. However, it appears that the population in the district is stabilizing and continued reduction on a percentage basis is not likely to occur in the future.

The Board is prepared to confirm the number and boundaries of the existing polling districts with the inclusion of Mattie Settlement/Grosvenor in District 8. However, the Board strongly recommends that the Municipality conduct a review of the existing boundaries with the intent of drawing a new set of boundaries which will result in a more equal distribution of voters within the Municipality especially as these boundaries relate to the dividing of District 4 and a realignment of Districts 7, 8 and 9. The Board would be hopeful that the situation relating to the area around the Town of Antigonish could be resolved soon and this review could be carried out prior to the 1991 election.

An order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 3rd day of March, A.D., 1988.

MICHAEL G. JOHNSON, C.A.,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

RE: MUNICIPALITY OF THE DISTRICT OF ARGYLE

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-
MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

Municipality applied to create 3 new districts and 3 additional Councillors changing Councillor to voter ratio from 1-805 to 1-614. Board refused and requested Council to review proposal and submit an alternative. Council submitted a new application without any basic change or any more statistical information.

HELD: The Board granted the original application and recommended that an application be made prior to the 1991 election.

The Board considered the geographical features of A are somewhat unique. The Board felt that the proposed average Councillor to voter ratio (1 - 614) is unnecessarily low. Council chose not to comply properly with the Board's preliminary decision except to incorporate splitting of District 19 into two Districts. This was an unacceptable alternative since it would leave District 21 with a 51% voter differential from the average Councillor to voter ratio which is neither fair nor reasonable.

Council's firsthand knowledge of the area can propose superior alternatives to alternatives imposed by the Board. Despite the Board's continued belief that a better solution is available, the Board does not have sufficient information before it to fairly draw new boundaries and it is therefore not going to impose its own solution at this time.

Because of Council's attitude, the Board considered maintaining the status quo but the present representation is neither fair nor reasonable to the voter. In order to ensure the voters are equally represented at the next election, the Board approves the original application. The Board recommends the new Council undertake an extensive review of the boundaries and the polling districts prior to the 1991 election. Consideration should be given to realigning the boundaries and to reducing the number of polling districts.

NSMB-22-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE DISTRICT OF ARGYLE** for the confirmation of the Number and Boundaries of the Polling Districts and the Number of Councillors to be elected from each Polling District.

BEFORE: LINDA D. GARBER, Vice-Chairman.

DECISION

On February 5, 1987, the Board issued a Preliminary Decision in the Application made by the **MUNICIPALITY OF THE DISTRICT OF ARGYLE** (hereinafter referred to as the "Municipality"), respecting Section 17 of the Municipal Boundaries and Representation Act. The Municipality had originally requested that the boundaries of the various districts be changed so as to create three new polling districts and three new councillors. The Board in its Preliminary Decision stated at page 4 as follows:

> "While the Board agrees that there should be changes made to the boundaries of the Polling Districts, the Board does not believe that it is necessary to create 3 new polling districts. It appears to the Board that it is possible to realign the existing boundaries and thereby equalize the voter population without adding

three polling districts."

The Board then requested that Council review the application and consider submitting an alternate proposal by March 11, 1988.

The voter statistics for 1985 were as follows:

DISTRICT	VOTERS	VARIATION FROM AVERAGE	PERCENT VARIATION FROM AVERAGE
14	652	(152)	(19%)
15	904	100	12%
16	771	(33)	(4%)
17	640	(164)	(20%)
18	552	(252)	(31%)
19	1,360	556	69%
20	519	(285)	(35%)
21	1,039	235	29%

TOTAL: 6,437

AVERAGE: 805 (Voters per Councillor)

In support of their original proposal the Municipality presented the following estimated 1988 voter statistics:

DISTRICT	VOTERS	VARIATION FROM AVERAGE	PERCENT VARIATION FROM AVERAGE
14	586	(28)	(5%)
15	735	121	20%
16	558	(56)	(9%)
17	650	36	6%
18	642	28	5%
19	696	82	13%
19A	686	72	12%
20	519	(95)	(15%)
21	573	(41)	(7%)
21A	560	(54)	(9%)
22	553	(61)	(10%)

TOTAL: 6,758

AVERAGE: 614 (Voters per Councillor)

While the geographical features of the Municipality are somewhat unique, it still appears to the Board that the boundary lines could be redrawn in such a way to permit a more evenly distributed population without the creation of three new polling districts. The effect of the original proposal is to reduce the average number of voters per councillor from 805 to 614 which in the Board's opinion seems unnecessarily low.

The Council of the Municipality chose not to comply with the Board's request and for reasons which were not revealed to the Board, chose not to review the boundaries but merely to request that Polling District 19, which comprises West Pubnico, be divided into 2 districts. This was part of the original application. It is an unacceptable alternative since the effect will be to leave District 21 with a +51% variation from the average number of voters per councillor. This is neither fair nor reasonable.

The Board has taken the position in these Section 17 applications that it is best if the Council of the Municipality, having first-hand knowledge of the area, can propose the alternatives rather than having an alternative imposed by the Board. It is for this reason that the Board has issued preliminary decisions. For reasons which are unknown to the Board, the Council of this Municipality has chosen not to follow up on the Board's request except in a cursory manner. While the Board has held second hearings in some jurisdictions following the receipt of the requested information, in this case a second hearing is not required since the information submitted was part of the original proposal.

The Board has reviewed the original proposal and the various submissions which were made at the hearing on January 26, 1988. While the Board still believes that there are viable alternatives which would permit a better distribution of population in the polling districts without the necessity of adding three polling districts and three councillors, the Board does not have sufficient information to fairly draw new boundaries and is therefore not going to impose its own solution at this time. Given the attitude of Council, the Board considered maintaining the status quo, but the present representation is neither fair nor reasonable.

In order to ensure that the voters of the Municipality are equally represented at the next election, the Board will approve the original application which is to divide Polling District 19 into two districts, divide Polling District 21, which is comprised of Wedgeport and Lower Wedgeport, into two districts adding a portion from District 14 and create a new Polling District 22 from parts of Polling Districts 15, 16, 17 and 20.

The Board is strongly recommending that the new Council of the Municipality undertake an extensive review of the boundaries of the polling districts and make an application to the Board prior to the 1991 election. Consideration should be given to realigning the boundaries to reduce the number of polling districts.

An Order setting out the Boundaries will be issued.

DATED at HALIFAX, Nova Scotia, this 15th day of March, A.D., 1988.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

RE: MUNICIPALITY OF THE DISTRICT OF BARRINGTON

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

B applied to change its polling districts to eliminate its dual districts. The changes proposed would make two districts different from the average ratio of councillors to voters. District 1 would be 45.9% above the average and District 5 would be 57% below the average. The application did not propose any change in the number of polling districts or Councillors.

HELD: The Board approved the application.

In respect to District 1, the Board is satisfied that due consideration has been given to the best relation of population density and community of interest in the proposal to eliminate the dual districts.

District 5, the smallest district in population, is the largest district in geographic area. Population could not easily be joined to another district or distributed among other districts. The Board feels that the proposed imbalance is justified by these factors. The elimination of dual districts is a desired objective.

NSMB-23-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE DISTRICT OF BARRINGTON** for the approval of certain changes in the Number and Boundaries of the Polling Districts and the Number of Councillors to be elected from each Polling District.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE DISTRICT OF BARRINGTON** (hereinafter referred to as the "Municipality") for the approval of certain changes in the number and boundaries of the Polling Districts in the Municipality was heard on Monday, December 14, 1987, in Council Chambers, Barrington, after due public advertisement in the Coast Guard and The Guardian.

Mr. Irving Pink, Q.C., appeared as counsel for the Municipality, together with the Municipal Clerk and Treasurer, Mr. Jack Fry and Warden Tony Perry.

The changes requested by the Municipality are not complex. The Municipality proposed in its application that certain polling districts be made into single districts. District

1 would be separated into two polling districts, with the new District 1 to include Upper Woods Harbour, Charlesville, Forbes Point, St. John Island, Central Woods Harbour and Woods Harbour. The new District 2 would include Shag Harbour, Lower Shag Harbour, Bear Point, Bon Portage Island and would include an area containing electors living west of Atwood's Brook.

District 7 is the other "dual" district. The Municipality proposed that Districts 6 and 7 be divided to create 3 new polling districts which would more equitably distribute the voters. New District 7 would include the communities of North East Point, Clam Point and Stoney Island; new Polling District 8 would include Centreville, Newelton and West Head; and new Polling District 9 would include Lower Clark's Harbour, The Hawk and South Side.

The Municipal Council approved the proposed changes in a resolution passed on July 2, 1987.

The voter statistics for the 1985 municipal elections in Barrington are outlined below, as well as the effect of the proposed changes on voting populations:

SCHEDULE OF ELECTORS
FOR EXISTING POLLING DISTRICTS

POLLING DISTRICT NUMBER	NUMBER OF COUNCILLORS	NUMBER OF ELECTORS	ELECTORS PER COUNCILLOR	VARIATION FROM AVERAGE	% VARIATION FROM AVERAGE
1	2	1,428	714	109	18.0
2	1	658	658	53	8.8
3	1	642	642	37	6.1
4	1	260	260	(345)	(57.0)

5	1	538	538	(67)	(11.1)
6	1	821	821	216	35.7
7	2	1,096	548	(57)	(9.4)
		5,443			

AVERAGE 605 (Voters per Councillor)

SCHEDULE OF ELECTORS FOR PROPOSED POLLING DISTRICTS

POLLING DISTRICT NUMBER	NUMBER OF COUNCILLORS	NUMBER OF ELECTORS	ELECTORS PER COUNCILLOR	VARIATION FROM AVERAGE	%VARIATION FROM AVERAGE
1	1	883	883	278	45.9
2	1	545	545	(60)	(9.9)
3	1	658	658	(53)	(8.7)
4	1	642	642	(37)	(6.1)
5	1	260	260	(345)	(57.0)
6	1	538	538	(67)	(11.0)
7	1	697	697	92	15.2
8	1	574	574	(31)	(5.1)
9	1	646	646	41	6.7
		5,443			

AVERAGE: 605 (Voters per Councillor)

The proposed changes would result in two ridings exceeding a 33 1/3% variation from the average voters per councillor. New District 1 would be 45.9% above the average and District 5 will be 57% below.

In the last review of municipal boundaries, the Public Utilities Board frequently commented in its decisions on the principle of representation by population and the need to create equitable polling districts. In its decision dated April 13, 1982, on the application of the Municipality of the County of Annapolis, the Board stated at page 3:

> "The preceding table indicates that Districts 1, 9 and 10 all vary more than 30% from average. The

> Board has commented in other decisions that disparities of that magnitude are undesirable".

In its decision dated December 24, 1981, on the application of the Municipality of the County of Pictou, the P.U.B. noted at page 4:

> "The Board has never attempted to lay down a hard and fast rule as to the extent to which the population of a polling district may deviate from the average. The ideal is to have each polling district with the same number of voters. Each citizen's vote is then worth the same as every other citizen's vote and representative government truly is representative. On the other hand, the Board considers that the representation by population principle may be legitimately modified to take account of geographical factors such as travelling distances between communities and clearly identifiable and well established communities of interest which should not be split up in order to achieve a theoretically perfect distribution of population.
>
> It is worth noting, however, that the Electoral Boundaries Readjustment Act of Canada requires that the population of federal constituencies vary by no more than 25% from the average population for all constituencies in a Province and that the Nova Scotia Select Committee on Electoral Boundaries directed in 1978 that the population of each provincial constituency vary by no more than 33 1/3% from the average population of all constituencies.
>
> The Board is of the opinion that on its next review of polling district boundaries the Municipality should seriously endeavour to at least meet the guidelines proposed by the Nova Scotia Select Committee."

In the present case, where the Municipality has proposed a division of District 1 into two separate polling districts, the Board is concerned that it be done as equitably as possible. Previously, District 1 was divided into 3 polling divisions, as presented in evidence as Exhibit B-1. In proposing a dividing line for new Districts 1 and 2, the Municipality examined the possibility of separating the Woods

Harbour communities into two different polling districts. The Municipality felt that there was a strong community of interest between Central Woods Harbour, Upper Woods Harbour and Lower Woods Harbour which necessitated keeping them in the same district, even though the population of District 2 would be lower. The Municipal Clerk testified that the public would easily understand where the new boundary between District 1 and 2 would be as it would follow natural community lines. The Board is satisfied that the Municipality has given due consideration to the question of relative population densities and community of interest in its proposal to divide this dual district. Upon reviewing the application and the evidence presented at the hearing, the Board is of the opinion that the Woods Harbour communities should all remain in the same district, that being the proposed District 1.

The other district of concern is proposed District 5, which is 57% below the average population per councillor. Evidence from the Warden, Tony Perry, who presently represents that district (currently District 4), indicated that although it is the smallest district in terms of population, it is also the largest in terms of geographic area. The population of this district could not be easily joined to any other district, nor could it be distributed among other districts. The Board is of the opinion that the population imbalance is justified in light of these factors.

The Municipality is not asking for any changes in the number of councillors, which will remain at nine. The elimination of dual districts should allow the voters in a district to easily identify their councillor. The Board is of the opinion that the changes proposed by the Municipality are appropriate and an Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 12th day of February, A.D., 1988.

MICHAEL G. JOHNSON, C.A.,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD

RE: MUNICIPALITY OF THE COUNTY OF CAPE BRETON

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

Application for certain changes in polling division boundaries and confirmation of the existing number of councillors. Application based on distinguishing rural and urban districts. In urban areas ratio to be 1 councillor to 3,500 persons and in the rural area 1 councillor to 1,700 persons. At present, the average ratio of councillor to voters was 1 councillor to 1,417 voters. Municipality relied on June, 1982 P.U.B. decision.

HELD: The Board approved the application and strongly recommended a review of boundaries and representation prior to the 1991 municipal elections.

The Board generally became concerned when variations exceeded 33 1/3 variation from the average number of voters per councillor. Representation by population was a paramount concern. Geographic area and community of interest have to be weighed with the population density of polling districts. The P.U.B. decision cited can only be a tacit acceptance of the rural/urban differential. It did not approve continued variation in voter population on the basis of urban/rural factor.

While confirming the application the Board strongly recommends a review of all existing polling districts to result in more equal distribution of voters. It is imperative that voter imbalance be corrected as soon as possible.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE COUNTY OF CAPE BRETON** for the confirmation of the number and approval of certain changes in the Boundaries of the Polling Districts and for confirmation of the Number of Councillors to be elected from each Polling District.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE COUNTY OF CAPE BRETON** (hereinafter referred to as the "Municipality") for the confirmation of the number and approval of certain changes in the boundaries of the Polling Districts and for confirmation of the number of Councillors to be elected from each was heard in Sydney on March 2, 1988, after due public notice in the Cape Breton Post, a newspaper circulating in the Municipality.

Mr. David Muise appeared as counsel for the Municipality, together with Mr. Jim Cunningham, Chief

Administrative Officer, Warden Joseph Walden and Mr. Jerry Ryan, Municipal Clerk-Treasurer.

During 1987, the Municipality caused a study to be done into the fairness and reasonableness of the representation and the boundaries of the polling districts within the Municipality. A Committee of Council met on 4 or 5 occasions throughout the year, and on October 20, 1987 recommended to Council that the boundary line between Districts 12 and 13 be changed, but otherwise the 20 Districts should remain the same.

Council approved the recommendation by Resolution dated October 20, 1987.

The Municipality submitted the following voter statistics from the 1985 municipal elections:

DISTRICT	VOTERS REGISTERED	VARIATION FRON AVERAGE	% VARIATION FROM AVERAGE
1	1,447	(23)	(1.5%)
2	1,478	8	.5%
3	1,736	266	18.0%
4	1,760	290	19.7%
5	1,835	365	24.8%
6	490	(980)	(66.6%)
7	1,208	(262)	(17.8%)
8	2,341	871	59.0%
9	1,631	161	10.9%
10	2,677	1207	82.0%
11	512	(958)	(65.0%)
12	1,162	(308)	(20.9%)
13	668	(802)	(54.5%)
14	1,118	(352)	(23.9%)
15	1,097	(373)	(25.3%)
16	1,288	(182)	(12.3%)
17	2,290	820	55.7%
18	2,128	658	44.7%
19	1,177	(293)	(19.9%)
20	1,351	(119)	(8.0%)

TOTAL: 29,394

AVERAGE: 1,470 (Voters per Councillor)

The Board generally becomes concerned when variations exceed a ± 33 1/3% variation from the average number of voters per councillor. The principle of representation by population demands that each citizen's vote carry approximately the same weight when determining the elected representatives. The factors of geographic area and community of interest have to be weighed, however, in conjunction with the population density of the polling districts.

In its study submitted as part of the application, the Municipality noted at page 2 that:

> "In June, 1982, the Public Utilities Board accepted the figures of 1700 persons and 3500 persons for rural and urban districts to enable examination. This adverse discrepancy of 12% can be overcome by adjusting such figures to 1500 persons and 3100 persons, respectively, plus or minus 10%."

The Board has reviewed the decision of the Public Utilities Board dated July 20, 1982 and can only conclude that such acceptance was tacit, and did not approve continued variations in voter populations on the basis of an explicit urban-rural factor. It is fair to say that the Municipality in presenting its application relied on the fact that such differential between rural and urban districts was acceptable. The Board has followed the principal that equality of voter representation is the paramount consideration in all reviews and that community of interest and geographic size and location, although important, are secondary considerations.

District 6 has only 490 voters and is 66.6% below the average number of voters per councillor. It is one of the largest districts in geographical area, running from Ironville down to the Bras d'Or Lake. In the July 20, 1982 decision of the Public Utilities Board, it was noted at page 8, that:

> "It was originally recommended that a small portion of District 3 be added to District 6, but changes in the polling divisions prevents this from being effected at the present time."

Because the P.U.B. reviewed the application in June, 1982 and polling divisions had been set as of March 31st of that year, the P.U.B. was very limited in the changes it could implement. The Board notes that District 3, which borders on District 6, has over 1,736 voters at the present time, and is 18% above the average number of voters per councillor. The Board is disappointed that the change noted above was not included in the 1987 application. The Board is prepared to approve District 6, but recommends to the Municipality that it give further attention to the idea of combining a portion of District 3 with District 6 in an effort to better equalize voter population.

District 8 is 59% above the average number of voters per councillor, having 2,341 voters registered in 1[illegible] It is a small district in total area, and it would be difficult to add a portion of District 8 to surrounding districts, for example to Districts 9 or 10, without transferring the voter imbalance to those districts. In further reviews of this District, the Municipality should consider realigning Districts 7, 8 and 9 to more evenly distribute voter population throughout these districts.

District 10 has the highest voter population in the Municipality, having 2,677 voters, and is 82% above the average. This District is reaching the point where division into two separate polling districts may be warranted. In the previously noted decision of the Public Utilities Board, part of District 10 was added to District 12. District 12 is at present 20.9% below the average population per councillor and District 11 is 65% below the norm. The Board is of the opinion that the boundaries between District 10 and 12 should be reviewed before the 1991 municipal elections, in conjunction with District 11. In 1982, over 1,117 residents were added from District 10 to District 12, which greatly alleviated voter disparities. The Board suggests that the Municipality consider adding more of District 10 to District 12, and a part of District 12 to District 11.

District 17 is 55% above the average. In the Board's opinion this voter imbalance could be corrected by adding portions of District 17 to District 12, which is 20.9% below the average, or to District 13 which is 54.5% below the average. The Board is aware that any additions would make these two districts even larger in geographic area, however, it believes that these possibilities are worth the review of the Municipality in an effort to promote better voter equality.

The Board also notes that the Municipality has proposed a change in the boundaries between Districts 12 and 13, which will remove voters from District 13, notably in Upper Grand Mira, and transfer them to District 12. The Board is prepared to approve such a change, on the basis of community of interest but it notes that this change will exacerbate the voter deficit in District 13. The Board strongly recommends that the Municipality closely examine these districts with a view to correcting the voter imbalances.

Finally, District 18 exceeds the average number of voters per councillor by 44.7%. This District borders on District 15, 16 and 19 which are all below the average number of voters per councillor. The Board is of the opinion that minor changes could be made to the boundaries of these districts in the future to better equalize the number of voters in each district.

The Board heard evidence during the application that the Municipality had set up a permanent committee of Council to study the electoral boundaries and that it is considering adding members of the general public to the committee. The Board considers such a Committee an excellent first step to monitoring the voter population and community of interest within each polling district and has attempted to point out in this decision areas such a committee should explore. Public input on the Committee or at hearings of the Committee should also be encouraged.

The Board noted that the boundaries of District 5 had changed as a result of the Board's decision in the New Waterford annexation application, and the solicitor for the Municipality agreed to provide a new description for this District to reflect that decision. This change will be incorporated in the Order.

The Board is prepared to confirm the application of the Municipality, however, the Board strongly recommends that the Municipality conduct a review prior to the 1991 municipal elections of all the existing boundaries, with the intent of drawing new boundaries that will result in a fairer distribution of the voters within the polling districts. It is imperative that these voter imbalances be corrected as soon as possible.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 25th day of March, A.D., 1988.

Michael Johnson

MICHAEL G. JOHNSON, C.A.,
Chairman.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

RE: MUNICIPALITY OF THE DISTRICT OF CHESTER

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-
MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

application for certain minor changes to polling division boundaries and confirmation of the number of polling districts and the number of councillors. District 2 was 47% over the average. This district contains C.F.B. Millcove with 200 voters who do not normally vote in a Municipal Election. District 6 was 38% below the norm.

HELD: The Board approved the application for change and confirmed the number of councillors.

The Board primarily concerned with districts varying 33 1/3% from the norm.

When variation exceeds 33 1/3% voter equality diminishes.

As to District 2 (C.F.B. Millcove) the Board says the Council is justified in not giving too much weight to the 200 voters therein contained. They are very much a self-contained unit. Their need for municipal service is minimal. Long-term association with the community is limited by inevitable military transfers.

District 2 is prevented by geography from being apportioned out to reduce its total number of voters among District 1 and District 9. P.U.B. had reviewed District 6 some time ago in 1982 and decided that if District 6 and 7 were combined to bring up the voters, it would include 50% of the total land area of the Municipality. P.U.B. decided that this was not correct and the Board saw no reason to change.

Some forty properties in District 8 receive services from District 4 and were assessed in District 4. Council felt the occupants of those properties should vote as well in District 4 on the basis of community of interest. The Board agreed. Council wished clarification of the boundaries in Districts 5 and 10 although no voters were affected by the change. The Board approved of this.

NSMB-25-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE DISTRICT OF CHESTER** for the confirmation of the Number and approval of certain changes in the Boundaries of the Polling Districts and the confirmation of the Number of Councillors to be elected from each Polling District.

BEFORE: LINDA D. GARBER, Vice-Chairman.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE DISTRICT OF CHESTER** (hereinafter referred to as the "Municipality") for the confirmation of the number and approval of certain changes in the boundaries of the Polling Districts in the Municipality and confirmation of the number of councillors to be elected from each, was heard on February 4, 1988, in Council Chambers, Chester, after due public advertisement in the Chronicle Herald and the Lunenburg Progress Enterprise, two newspapers circulating in the Municipality.

Mr. Derek Wells appeared as counsel for the Municipality, together with the Municipal Clerk, Mr. Barry

Lenihan, Mr. Bruce Preeper, Councillor for District 5, Mr. John Chattaway, Councillor for District 8, Warden Stan Melvin, Councillor for District 9, Councillor Percy H. Shatford, who represents District 2 and Mr. Harold Cleveland, Councillor for District 1.

The Council appointed a Committee to review the fairness and reasonableness of the boundaries and representation and the recommendations of this Committee were approved by Resolution of Council dated December 29, 1987. At the hearing, a change amending the boundary between Districts 5 and 10 was submitted, which had been approved by Resolution of Council dated January 18, 1988.

The voter statistics for the Municipality from the 1985 municipal elections are as follows:

DISTRICT	VOTERS	VARIATION FROM AVERAGE	PERCENT VARIATION FROM AVERAGE
1.Bayswater, Blandford	579	(210)	(27%)
2.Fox Point, Mill Cove	1161	372	47%
3.Chester East, West	875	86	11%
4.Chester Basin	883	94	12%
5.Martin's Point	821	32	4%
6.New Ross West	493	(296)	(38%)
7.New Ross	776	(13)	(2%)
8.Windsor Road, Marriotts Cove	787	(2)	(.3%)
9.East River, East Chester	892	103	13%
10.Beech River, Western Shore, North	626	(163)	(21%)
TOTAL:	7,893		
AVERAGE:	789 (Voters per Councillor)		

The Board is primarily concerned with the districts where the variations exceed a ± 33 1/3% variation from the average number of voters per councillor. The principle of representation by population demands that each citizen's vote carry approximately the same weight when determining elected representatives. The Board is of the opinion that when variations exceed ± 33 1/3%, voter equality is diminished.

District 2, (Fox Point, Simms Settlement and Mill Cove) has the largest number of voters and is 47% above the average number of voters per councillor. The evidence of the Councillor for District 2 indicated that approximately 200 voters are living on the Canadian Forces Base at Mill Cove, but that they are very much a self-contained unit. Their need for municipal services is minimal, and long-term association with the community is limited by inevitable military transfers.

Any attempts to combine portions of District 2 to Districts 1 or 9 are made difficult by geographic distances and there is really no convenient way to divide the populated areas.

The other district which exceeds the ± 33 1/3% variation is District 6, New Ross West, which is 38% below the norm. Districts 5, 6, and 7 were reviewed by the Public Utilities Board by separate application in 1982. In its decision dated September 27, 1982, the Public Utilities Board concluded that if Districts 6 and 7 were amalgamated, the new district would contain 50% of the land mass of the entire Municipality. It further found that amalgamation would result in the district being well above the average number of voters per councillor. The Board has reviewed this decision in light of the present application and has come to the conclusion that there have been few material changes to this situation since 1982.

In its application, the Municipality has proposed a small change in the boundaries of Districts 4 and 8. There are approximately 40 properties affected which are at present in District 8, but which are receiving services in District 4, and are assessed in District 4. It would make sense to have the people in this area vote in District 4 on the basis of community of interest and the Board considers it appropriate to approve this change.

The Municipality passed a Resolution on January 18, 1988, regarding the boundary between Districts 5 and 10, which will not affect any voters but will clarify the boundary between these two districts. The Board is prepared to approve this change.

The Board has reviewed the application, the evidence in support of the application and the previous decisions of the Public Utilities Board. The Board is of the opinion that the application should be approved, and an Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 9th day of March, A.D., 1988.

Linda D. Garber

LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

RE: MUNICIPALITY OF THE DISTRICT OF CLARE

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS- MUNICIPAL BOUNDARIES AND REPRESENTATION ACT S. 17.

Application to make certain minor changes in polling district boundaries and to confirm the number of districts and to confirm the number of councillors elected from each. District 2 was a large geographic area but voter populations were centered on the main roads. No district varied more than 20% from the norm. There was no citizen request for change.

HELD: The Board approved the application as made.

The average Councillor to Voter ratio (1-882). The Board commended the Municipality for maintaining polling districts relatively equal in terms of voters with variations no more than 20% one way or the other from the norm.

NSMB-26-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE DISTRICT OF CLARE** for the confirmation of the Number and approval of certain changes in the Boundaries of the Polling Districts and the confirmation of the Number of Councillors to be elected from each Polling District.

BEFORE: LINDA D. GARBER, Vice-Chairman.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE DISTRICT OF CLARE** (hereinafter referred to as the "Municipality") for the confirmation of the number and approval of certain changes in the boundaries of the Polling Districts in the Municipality and confirmation of the number of councillors to be elected from each, was heard on January 27, 1988, in the Municipal Building in Little Brook after due public advertisement in the Chronicle Herald and Le Courrier, two newspapers circulating in the Municipality.

Mr. Alan Boudreau appeared as counsel for the

Municipality, together with Warden Paul Comeau and Mr. Delphis Comeau, Municipal Clerk-Treasurer.

The Municipality caused a study to be completed, which reviewed voter statistics in the polling districts over the last five municipal elections. The voter statistics for the 1985 election in the municipality are as follows:

DISTRICT	1985 VOTERS	VARIATION FROM AVERAGE	PERCENT VARIATION FROM AVERAGE
1	764	(118)	(13%)
3	919	37	4%
4	904	22	2%
5	932	50	6%
6	1020	138	16%
7	808	(74)	(8%)
8	813	(69)	(8%)
2	901	19	2%

TOTAL: 7061

AVERAGE: 882 (Voters per Councillor)

All the municipal polling districts are well under the ± 33 1/3% variation from the average number of voters per councillor that the Board has used as a guideline towards voter equality. The Board would commend the Municipality for maintaining polling districts which are relatively equal in terms of voters and which vary less than ± 20% from the average.

The testimony of the Warden indicated that the population of the polling districts had remained fairly stable, and that there had been no requests received from citizens with respect to changes in the boundaries or their representation on council. The polling districts appear to follow the various communities along Highway 1, with the exception of District 2. The evidence indicated that while District 2 encompassed a large geographic area, most of the voter population was centered on the main roads through the district.

The Municipal Clerk indicated that certain changes were being requested to the legal descriptions of the boundaries, which did not affect any voters, but which would clarify exactly where the lines were drawn and make them readily identifiable both to the returning officer and to the public. The Board is of the opinion that these clarifications are entirely appropriate for this type of review, and should be approved.

Having reviewed the application, the evidence presented in support thereof, and the decision of the Public Utilities Board during the last municipal boundary review, the Board is of the opinion that the application should be confirmed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 2nd day of March, A.D., 1988.

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

RE: MUNICIPALITY OF THE COUNTY OF COLCHESTER

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS- MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

Council set up a Committee with guidelines to make recommendations on fairness and reasonableness of representations in C. The committee recommended an ideal of no more than 15%± variation from a district population of 2,000. The Committee suggested that the Districts in Bible Hill be realigned to equalize population to account for future growth. Council rejected the Committee's recommendations and applied to the Board for confirmation of the status quo.

HELD: The Board approved Council's application.

While impressed by the Committee's study, the Board is reluctant to oppose an ideal variation ± 15% from the average population per district until Council has approved it. The Board would approve any move to voluntarily accept 15% ± variation. The Board will not impose these standards when they have not been required of other municipalities.

The Board will not change the voter imbalance in District 7 because it would only transfer the voter imbalance to District 8.

NSMB-27-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE COUNTY OF COLCHESTER** for the confirmation of the Number and Boundaries of the Polling Districts and the Number of Councillors to be elected from each Polling District.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE COUNTY OF COLCHESTER** (hereinafter referred to as the "Municipality") for the confirmation of the number and boundaries of the Polling Districts in the Municipality and the number of Councillors to be elected from each was heard in Truro on December 9, 1987 after due public advertisement in the Truro Daily News.

Mr. Logan Barnhill and Mr. Malcolm MacLeod appeared as counsel for the Municipality, together with Mr. Stewart Bishop, Director of Planning, Warden Lawrence Nason, Mr. Gordon Creelman, Municipal Clerk, and Councillors Dwight Higgins and Ralph Taylor.

The Municipality assigned the task of reviewing the fairness and reasonableness of existing polling districts and representation to a Boundaries and Representation Committee. Mr. Stewart Bishop, Director of Planning, outlined in evidence the methodology used in preparing the study, and the recommendations made by the committee to the municipal council.

The guidelines used by the Committee are outlined below:

> "1. As near as possible, each Councillor should represent an equal population while taking polling district size into account.
>
> 2. That existing polling district lines should be used if at all possible.
>
> 3. That districts should not be more than 20 miles wide in any direction.
>
> 4. That the average population which one Municipal Councillor should represent would be 2,000.
>
> 5. That the number of polling districts should not be increased.
>
> 6. That there should be no more than one councillor for each polling district."

The voting and population statistics were also included in the Committee's study:

POLLING DISTRICT	AREA (sq. mile)	POPULATION (1986)	VOTERS (1985)	(VOTER) VARIATION FROM AVERAGE	(VOTER) PERCENT VARIATION FROM AVERAGE
1	1.1	1,621	1,107	(212)	(16.0%)
2	40.8	1,815	1,229	(90)	(6.8%)
3	51.0	1,517	1,518	199	15.0%
4	259.3	1,481	1,085	(234)	(17.7%)
5	1.8	2,175	1,492	173	13.1%
6	18.4	1,427	1,125	(194)	(14.7%)
7	104.6	1,235	816	(503)	(38.1%)
8	162.3	1,832	1,332	13	.9%
9	50.0	2,557	1,634	315	23.8%
10	75.4	2,235	1,467	148	11.2%

11	84.5	1,603	1,144	(175)	(13.2%)
12	207.4	1,350	1,003	(316)	(23.9%)
13	2.5	2,568	1,702	390	29.5%
14	54.2	2,486	1,685	366	27.7%
15	53.0	2,789	1,589	270	20.4%
16	163.0	1,551	1,173	(146)	(11.0%)
		31,242	21,101		

TOTAL: $\frac{21,101}{16}$ = 1,319

AVERAGE: 1,319 (Voters per Councillor)

The Committee established an ideal variation from the average of ±15% from a per district population of 2,000 people, and suggested that urban districts of Bible Hill, Districts 1 and 13, be realigned to equalize population and account for future growth patterns.

Council reviewed the Committee's excellent report, but decided in its resolution of November 5, 1987, to request that the Board confirm the present boundaries and number of councillors. Council felt that though District 1 might need more population, the commercial and educational activity in the District placed additional demands on the Councillor's time, and that could be counter-balanced against the increased population in District 13. At the Board's hearing both Councillors from District 1 and 13 testified that they supported Council's decision.

The Board has reviewed the application and weighed the evidence presented at the hearing very carefully. The Board is of the opinion that the application should be confirmed. While it was impressed with the Committee's study, the Board is reluctant to impose an ideal variation of ±15% from the average population per district unless Council had approved it. Looking at voter statistics, as opposed to population statistics, the Board has generally accepted a maximum variation of 33 1/3% from the average as a guideline toward equal representation.

This guideline was generally referred to in the last municipal boundary review conducted by the Public Utilities Board in 1981, and particularly in its decision dated December 24, 1981, on the application of the County of Pictou, stated that:

> "The Board has never attempted to lay down a hard and fast rule as to the extent to which the population of a polling district may deviate from the average. The ideal is to have each polling district with the same number of voters. Each citizen's vote is then worth the same as every other citizen's vote and representative government truly is representative. On the other hand, the Board considers that the representation by population principle may be legitimately modified to take account of geographical factors such as travelling distances between communities and clearly identifiable and well established communities of interest which should not be split up in order to achieve a theoretically perfect distribution of population.
>
> It is worth noting, however, that the Electoral Boundaries Readjustment Act of Canada requires that the population of federal constituencies vary by no more than 25% from the average population for all constituencies in a Province and that the Nova Scotia Select Committee on Electoral Boundaries directed in 1978 that the population of each provincial constituency vary by no more than 33 1/3% from the average population of all constituencies."

The Board would applaud any voluntary movement on the part of the Municipality towards an ideal variation of ±15% from the average, however, the Board is reluctant to impose this standard in Colchester against the wish of its Council when less has been required in other municipalities.

In the present case, only District 7 exceeds this 33 1/3% variation, and the Committee report indicated that this district was geographically distant, bordering on Tatamagouche Bay and the Pictou County line, and that it could only gain population at the expense of District 8. Changing District 8 would only transfer the voter/representation imbalance to that District.

The Board hereby approves the application of the Municipality, and will order that the present number of councillors and the number and boundaries of the polling districts be confirmed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 15th day of February, A.D., 1988.

MICHAEL G. JOHNSON, C.A.,
Chairman.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD

RE: MUNICIPALITY OF THE COUNTY OF CUMBERLAND

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

Council appointed a study committee which recommended the polling districts be increased from 12 to 13, the dual representation be eliminated except for one and the number of Councillors be reduced to 14. Council rejected the recommendation and applied to confirm status quo. The Board issued a preliminary decision requesting a new application. The new proposal changed the voter to councillor ratio from (1-763) to (1-814), redistributed the boundaries so that no polling district would differ from the norm by more than 33 1/3%± and reduced the number of councillors from 16 to 15.

HELD: The Board approved the application.

The Municipality's proposal created polling districts within 33 1/3% of the norm, thereby supporting the principal of representation by population. The Board encourages the Municipality to review municipal boundaries at least after each election and see that the representation by population remains fair.

District 10 was left as is due to the community of interest.

NSMB-28-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S. 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE COUNTY OF CUMBERLAND** for the confirmation of the Number and Boundaries of the Polling Districts and the Number of Councillors to be elected from each Polling District.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

DECISION

The application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE COUNTY OF CUMBERLAND** (hereinafter referred to as the "Municipality"), for the approval of certain changes in the number and boundaries of the Polling Districts in the Municipality and the number of Councillors to be elected from each, was heard at the Council Chambers, Upper Nappan, Nova Scotia, on March 11, 1988 after being advertised in the Chronicle Herald and the Springhill-Parrsboro Record, two newspapers circulating in the Municipality.

The hearing was convened to review the new proposal submitted by the Municipality in response to the Preliminary Decision issued by the Board in this matter on December 24, 1987. Mr. Morris Haugg appeared as counsel for the Municipality, in the absence of John LeMoine, together with the Municipal Clerk, Mr. Frank Harrison, and several members of the Municipal Council.

At the outset of the hearing, Councillor Charles Davison made a formal complaint to the Board that the public was not properly notified of the hearing. He stated that the "Springhill-Parrsboro Record" containing the Notice of Hearing did not reach his constituents until Thursday, one day prior to the hearing. The paper is published on Tuesday for distribution on Wednesday. There were no other objections to the Notice of Hearing.

The Municipal Boundaries and Representation Act is silent with respect to advertisement for Section 17 applications, however, Section 4 of the Act indicates that the provisions of the Municipal Board Act shall apply except where inconsistent with the Act. Section 25 of the Municipal Board Act indicates that the advertisement of a hearing shall be in one or more newspapers circulating in the Municipality for three consecutive weekly insertions unless otherwise ordered by the Board. In this case the Board ordered that the Notice of Hearing be published on one occasion in the Chronicle-Herald, on Wednesday, March 9, 1988, and in the Springhill-Parrsboro Record.

The Board apologized for the short notice of the hearing, but noted that the large turnout for the hearing and the fact that the proposed changes were discussed at both the January 6, 1988 and February 3, 1988 meetings of council indicated that the public were aware of the proposed changes. The Board also noted that the Municipal boundary review had to be completed by March 31, 1988, in order to allow the Municipal Clerk to determine polling divisions, and thus the hearing was scheduled on the first available date.

At the first hearing, the Municipality submitted the following voter statistics for the 1985 municipal elections:

MUNICIPALITY OF CUMBERLAND

COUNCILLOR TO VOTER RATIO - 1985

DISTRICT NO.	NO. OF VOTERS 1985	NO. OF COUNCILLORS	VOTERS PER COUNCILLOR	VARIATION FROM AVERAGE	PERCENT VARIATION FROM AVERAGE
1	2,349	2	1,174	411	53.9%
2	696	1	696	(67)	(8.8%)
3	1,089	2	544	(219)	(28.7%)
4	625	1	625	(138)	(18.1%)
5	1,533	2	766	3	0.4%
6	899	1	899	136	17.8%
7	1,552	2	776	13	1.7%
8	969	1	969	206	27.0%
9	441	1	441	(322)	(42.2%)
10	562	1	562	(201)	(26.3%)
11	628	1	628	(135)	(17.7%)
12	868	1	868	105	13.8%
TOTAL:	12,211	16			

AVERAGE: 763 (Voters per Councillor)

In its Preliminary Decision dated December 24, 1987, the Board noted that District 1 and District 9 had large variations from the average number of voters per councillor, and that the decision of Public Utilities Board in 1981 had requested that the Municipality make strenuous efforts to come up with boundaries which would correct the serious voter imbalances. The Board requested that the Municipality submit a new proposal by February 15, 1988, which would address the Board's concerns respecting Districts 1 and 9.

On February 3, 1988, the Municipality passed a Resolution approving a new proposal which would extend the boundaries of Districts 3 and 4 to include portions of District 1. In addition, Districts 9 and 11 were combined, and a portion of the new District 9 was added to District 6. District 10 remained as it had existed, Council having decided the community of interest in the region should not be disturbed.

In its proposal, the Municipality submitted the following estimate of voters based on eleven polling districts and fifteen councillors.

ESTIMATED NUMBER OF VOTERS IN CONCEPTUAL POLLING DISTRICTS

FEBRUARY, 1988

DISTRICT	NO. OF VOTERS	NO. OF COUNCILLORS	VOTERS PER COUNCILLOR	VARIATION	PERCENTAGE VARIATION
1	2,076	2	1,038	224	27.5%
2	696	1	696	- 118	-14.5%
3	1,268	2	634	- 180	-22.1%
4	719	1	719	- 95	-11.7%
5	1,533	2	766	- 48	-5.9%
6	987	1	987	173	21.2%
7	1,552	2	776	- 38	-4.7%

8	969	1	969	155	19.0%
9	981	1	981	167	20.5%
10	562	1	562	- 252	-31.0%
11	868	1	868	54	6.6%
TOTAL:	12,211	15			

AVERAGE: 814 (Voters per Councillor)

The Board notes that by reducing the number of councillors to 15, the average number of voters per councillor has only increased by 51 voters.

The Board appreciates the difficult task that the Municipality faced in reducing the number of councillors and in redrawing the electoral boundaries. The Municipality's proposal will result in all districts being below a ± 33 1/3% variation in the number of voters per councillor, and the Municipality is to be commended for creating polling districts which respect the principle of representation by population. The Board encourages the Municipality to continue to monitor voter population after each election to ensure continuation of this principle and apply to the Board for any change deemed necessary.

The Board indicated at the completion of the hearing that it would be approving the application so that the planning staff of the Municipality could begin to prepare descriptions of the polling districts. Upon receipt of those descriptions, an Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 23rd day of March, A.D., 1988.

Michael G Johnson

MICHAEL G. JOHNSON, C.A.
Chairman.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD

RE: MUNICIPALITY OF THE DISTRICT OF DIGBY

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS- MUNICIPAL BOARD ACT S. 25(1). MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

In 1981 P.U.B. decreed the highway into Digby be the boundary between polling Districts 2 and 8. Street lighting was installed on one side of the highway and paid for by an area rate. The other side of the highway was thereby lighted free. The Municipality recommended that the boundary be changed to the D.A.R. line from the overpass. This change would remove 85 voters in District 2 and put them in District 8 somewhat equalizing a present voter imbalance.

Briar Island and Peters Island (District 6) had a variation from the norm of 33 1/3%±.

District 9, Village of Weymouth, had 1365 voters represented by 2 councillors in a dual riding. Council supported the splitting of this District 9 into two Districts along the line of the Sissiboo River, with one councillor representing each new district. The Village Commissioners opposed the splitting up of the Village into two Districts.

HELD: The Board approved the application.

The change in the district 2 and 8 boundaries reduced voter imbalance somewhat and recognized a community of interest.

The principal of representation by population demands each citizen's vote to carry equal weight in deciding who is the elected representative. When variations from the norm exceed 33 1/3%± voter equality is unduly diminished. Briar Island is divorced in community of interest from Long Island and concerns of Briar Island have little in common with concerns of Long Island. District 6 should remain as a separate polling district to preserve its unique identity and strong community of interest.

The dual riding of the Village of Weymouth should be split along the line of the Sissaboo River. The Village would have the same number of councillors and the Village Commissioners would still be the same. The only difference is that each councillor now would be responsible for a specific geographic area in the village. The two new districts would thus have roughly equal voter population.

NSMB-29-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE DISTRICT OF DIGBY** for the approval of certain changes in the Number and Boundaries of the Polling Districts and the Number of Councillors to be elected from each Polling District.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE DISTRICT OF DIGBY** (hereinafter referred to as the "Municipality") for the confirmation of the number and approval of certain changes in the boundaries of the Polling Districts in the Municipality and the number of Councillors to be elected from each was heard in Digby on December 4, 1987.

The Board had forwarded the Notice of Hearing to the Digby Courier a newspaper circulating in the Municipality, for advertisement on November 18th, 25th and December 2, 1987. The advertisement was published correctly on November 17th but for unknown reasons did not appear on the two subsequent dates. The Board advertised the hearing on December 3rd and 4th, 1987, in the Chronicle Herald, a daily newspaper circulating in the Municipality, and radio announcements were broadcast on December 2nd and 3rd, 1987. The Board ordered that this constituted appropriate notice of the hearing pursuant to Section 25(1) of the Municipal Board Act.

Ms. C. Rebecca Wheeler appeared as counsel for the Municipality, together with Mr. Bill McMillan, Municipal Clerk, Mr. Ben Prince, Councillor for District 8, Mr. Glenn Dunn, Councillor for District 2, Mr. Foster Journeay and Warden Walter MacAlpine, Councillors for District 9, and Mrs. Pat McConnell, Councillor for District 6.

The Municipality called a special meeting of Council on June 10, 1987, to discuss the question of boundaries and representation, and the motions passed at that meeting became the basis of the application before the Board.

The first change recommended by the Municipality can be considered somewhat minor, but it does effect voters and ratepayers in Districts 2 and 8. In 1970, the Public Utilities Board decided that the boundary between Districts 2 and 8 should be the highway into the Town of Digby. In levying area rates for street lighting this brought about a situation where residents in one district paid area rates for the service, while those on the other side of the highway enjoyed the benefit without any cost. This particular matter was resolved but Council felt that it would help clear up any confusion in the future if the boundary were changed to follow the Dominion Atlantic Railway Line from the overpass, rather than the centre line of the highway.

The Clerk testified that this change would remove approximately 85 voters from District 2-Brighton and place them in District 8-Smith's Cove. This change would assist in equalizing voter population because at present, District 2 is one of the more populated districts, while District 8 is one of the smallest in terms of population.

In 1985 voter statistics for the Municipality are as follows:

DISTRICT	DISTRICT NO.	COUNCILLORS	VOTERS 1985	VOTER VARIATION FROM AVERAGE	PERCENT VARIATION FROM AVERAGE
Hillsborough	1	1	583	(95)	-14%
Brighton	2	1	950	272	40%
Sandy Cove	3	1	840	162	24%
Freeport/ Tiverton	4	1	607	(71)	-11%
Plympton	5	1	885	207	30%
Westport	6	1	256	(422)	-62%
Culloden	7	1	754	76	11%
Smith's Cove	8	1	544	(134)	-20%
Weymouth	9	2	1,365	4	1%
	TOTAL:	10	6,784		

AVERAGE: 678 (Voters per Councillor)

The principle of representation by population demands that each citizen's vote carry equal weight in determining elected representatives. When variations in voter population exceed ± 33 1/3% from the average voters per councillor, voter equality is unduly diminished.

In the present case, Districts 2 and 8 will move closer to the average number of voters per councillor as a result of the proposed boundary change. While the councillor for District 2, Mr. Glenn Dunn, expressed some reservations about the proposed change, the Board is satisfied that the change has merit both in terms of community of interest and in equalizing population between Districts 2 and 8.

The only other District which exceeds a ± 33 1/3% variation from the average number of voters per councillor is District 6, Westport. This district encompasses Brier Island and Peters Island, and has become renowned for both whale watching and bird watching. It is physically separated from District 4 (Long Island) by water and its residents must travel by ferry to reach Long Island and the mainland. The Councillor for District 6 indicated that Brier Island is divorced in community of interest from Long Island, and that the concerns of the Brier Island community have little in common with those of Long Island. The Board is satisfied on the evidence that District 6 should remain a separate polling district to preserve its unique identity and strong community of interest.

The final change proposed by the Municipality involved District 9 which is presently represented by two councillors. This district has 1365 voters, and encompasses the Village of Weymouth. The testimony of the two councillors from the District was that voters were confused by the system of electing two councillors at large, and that they could be more accountable to the electorate if their responsibilities were confined to a specific area. The Municipality proposed to use the Sissiboo River as a natural boundary between the two new districts.

The Board received a letter from the Village of Weymouth expressing disagreement with the proposed changes. It felt that the change would divide the Village in half and would be very detrimental to the Village. While the Board has considered the submission of the Village, it has reached the conclusion that the proposal submitted by the Municipality will enhance responsible representation in the Weymouth area. The Village will continue to be served by its three Village Commissioners, and the Weymouth area will continue to have two representatives on Council. The only difference will be that each councillor will be responsible for a specific geographic area and a specific number of voters. The evidence indicated that using the Sissiboo River as a natural dividing line would result in two districts with fairly even voter populations.

Having reviewed the application, the evidence presented at the hearing, and the 1981 decision of the Public Utilities Board, the Board is satisfied that the application should be approved.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 29TH day of February, A.D., 1988.

MICHAEL G. JOHNSON, C.A.
Chairman.

LINDA D. GARBER,
Vice-Chairman.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

RE: MUNICIPALITY OF THE DISTRICT OF GUYSBOROUGH

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

Municipality applied to confirm the number of Councillors and Polling Divisions and boundary changes required by the Board in annexation decision in Mattie Settlement. Some districts varied more than 33 1/3%± from the average ratio of voter to councillor (1-575).

HELD: The Board approved the application.

The Board is concerned with the degree of variation from the norm in Districts 2, 4 and 9. The Board followed the P.U.B. decision in Pictou in 1981 and conceded the difficulty to balance the principal of representation by population with facts related to geographic area and community of interest.

Districts 2 and 4 exceed the maximum permitted variation of 33 1/3%± from the norm. Both Districts are remote. They are not easy to be divided among other districts to more equitably distribute the voter population.

District 9 has the most voters but because of the strong community of interest of the Hazel Hill area it is not easily subdivided and apportioned among other districts. The Board considers these acceptable reasons for allowing the variation in excess of 33 1/3%± from the norm of equal representation.

NSMB-30-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **DISTRICT OF GUYSBOROUGH** for the confirmation of the Number and Boundaries of the Polling Districts and the Number of Councillors to be elected from each Polling District.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **DISTRICT OF GUYSBOROUGH** (hereinafter referred to as the "Municipality"), for the confirmation of the number and approval of certain changes to the boundaries of the Polling Districts in the Municipality and the number of Councillors to be elected from each, was heard in Council Chambers in Guysborough on December 7, 1987, after due public advertisement in the Scotia Sun and The Reporter.

Mrs. Louise Campbell appeared as Counsel for the Municipality, together with Ms. Cheryl Tynski, Municipal Clerk. Councillor Myles A. MacPherson for District No. 3 was also present.

The Municipality conducted a study of the number and boundaries of the polling districts and the number of councillors to be elected from each district. The study indicated that all districts had experienced changes in the number of eligible voters with the exception of Polling District No. 4; with the greatest increase being in District No. 9 with the addition of 130 voters; and the greatest decrease in District No. 3, with a loss of 37 voters. In her testimony, Ms. Tynski indicated that as a result of the Municipal Board decision in the Mattie Settlement case, District 3 would lose an estimated 100 to 120 voters. She felt that this polling district would still compare favourably with the other districts in terms of number of voters.

The Municipal Council passed a Resolution on October 14, 1987, requesting that the existing number and boundaries of the polling districts be confirmed with the exception of changes to District 3.

The following are the voter statistics for the Municipality for the 1985 Municipal elections. These statistics include Mattie Settlement, which was then part of District 3.

DISTRICT NO.	DISTRICT	NO. OF VOTERS	(VOTER) VARIATION FROM AVERAGE	(VOTER) PERCENT VARIATION
1	Guysborough	717	142	25%
2	Glencoe	358	(217)	(38%)
3	Manchester	740	165	29%
4	Melford	305	(270)	(47%)
5	Chedabucto	577	2	0%
6	Tor Bay	602	27	5%

7	Stormont	631	56	10%
8	Seal Harbour	440	(135)	(23%)
9	Hazel Hill	805	230	40%

TOTAL: 5,175
AVERAGE: 575 (Voters per Councillor)

The Board is concerned with the degree of variation from the average number of electors in Districts 2, 4 and 9.

As expressed in many of the Public Utilities Board decisions during the last municipal boundaries review in 1981, it is often difficult to balance the principle of representation by population with factors related to geographic area and community of interest. In the P.U.B. decision dated December 24, 1981, on the application of the County of Pictou, the Board stated at page 4:

> "The Board has never attempted to lay down a hard and fast rule as to the extent to which the population of a polling district may deviate from the average. The ideal is to have each polling district with the same number of voters. Each citizen's vote is then worth the same as every other citizen's vote and representative government truly is representative. On the other hand, the Board considers that the representation by population principle may be legitimately modified to take account of geographical factors such as travelling distances between communities and clearly identifiable and well established communities of interest which should not be split up in order to achieve a theoretically perfect distribution of pupulation.
>
> It is worth noting, however, that the Electoral Boundaries Readjustment Act of Canada requires that the population of Federal constituencies vary by no more than 25% from the average population for all constituencies in a Province and that the Nova Scotia Select Committee on Electoral Boundaries directed in 1978 that the population of each provincial constituency vary by no more than 33 1/3% from the average population of all constituencies."

Districts 2 and 4 are below what the present Board considers a maximum variation of 33 1/3% from the average voters per councillor. The Board notes that these districts constitute fairly remote areas that cannot be easily joined with other surrounding districts to more evenly distribute voter population. District 9 has a fairly compact area, bordering on the Town of Canso, and has the largest number of voters. However, this polling district could not be easily subdivided because of the strong community of interest within the Hazel Hill area. The Board considers these to be acceptable reasons for allowing a more than 33 1/3% variation from the norm of equal representation.

Having reviewed the Public Utilities Board Decision of December 16, 1981, and having considered the evidence presented on the application, the Board is of the opinion that the number and boundaries of the Polling Districts and the Number of Councillors to be elected in each should be confirmed.

The solicitor for the Municipality had a new legal description prepared for District No. 3 to reflect the changes determined by the Board's decision in the Mattie Settlement case dated June 12, 1987, and that new description will be incorporated into the Order.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 15th day of February, A.D., 1988.

MICHAEL G. JOHNSON, C.A.,
Chairman.

LINDA D. GARBER,
Vice-Chairman.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD

RE: MUNICIPALITY OF THE COUNTY OF HALIFAX

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

The Municipality applied for increased representation in Sackville, Cole Harbour and District 14 and certain minor boundary changes elsewhere. At the hearing concern was raised about a boundary in District 20 and the boundary between District 14 and the proposed new District 17. The Board issued a preliminary decision indicating it would approve the application subject to the submission of revised legal descriptions. Upon their receipt, the Board chose not to reconvene hearing despite a letter of request from a resident in Cole Harbour.

HELD: The Board approved the application as amended. Weldon dissenting. Per Chairman and Vice-Chairman.

In a Municipality which is developing at such a rapid rate, it is imperative that electoral boundaries change to meet the growth in population, to ensure that the principle of representation by population is observed.

On the issue of a second hearing. The first hearing was properly advertised and the subject of press comment. Hearing well attended. To allow persons who did not attend the first hearing to come forward at a later date and demand to be heard would be to set a dangerous precedent.

Per Weldon, dissenting.

The Board can only proceed on evidence received while in its evidentiary mode. The majority's final decision was premature and founded on something other than evidence presented before the Board. Board not acting fairly and in accordance with natural justice. A further hearing to consider the evidence should have been held.

The Board makes an effort because of its relative novelty to avoid dissent and arrive at a consensus decision.

NSMB-31-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE COUNTY OF HALIFAX** for the approval of certain changes in the Number and Boundaries of the Polling Districts and the Number of Councillors to be elected from each Polling District.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

DECISION

The Application of the **MUNICIPALITY OF THE COUNTY OF HALIFAX** (hereinafter referred to as the "Municipality") pursuant to Section 17 of the Municipal Boundaries and Representation Act for the approval of certain changes in the number and boundaries of the Polling Districts in the Municipality and the number of Councillors to be elected from each was heard in Council Chambers in Halifax on December 16, 1987 after due public notice in the Chronicle Herald and the Daily News, two newspapers circulating in the Municipality.

The Board issued a Preliminary Decision on this application on January 7, 1988, and an erratum to that decision was issued on January 11, 1988.

The Board stated at page 4 of its preliminary decision that:

> "The Board is of the opinion that the application to change the number of polling districts and the number of councillors should be approved provided that the concerns noted above have been addressed.
>
> The Board is issuing this preliminary decision with the intention that the Municipality will review its application and submit revised legal descriptions by February 19, 1988, which will include the Fall River area in the proposed District 17; and which will extend boundary of District 20 to the Bicentennial Highway."

On February 18, 1988 the Board received the revised legal descriptions together with a copy of the Report of the Redistribution Committee dated February 15, 1988. The Report's recommendations were passed unanimously by Municipal Council on February 16, 1988.

With respect to the Fall River area the boundary between District 14 and 17 in the revised legal description is a line crossing Highway No. 2 opposite Coach Road in Schwartzwald Subdivision and the "locks". This line extends from the end of the Coach Road to Highway No. 102, and from the locks through Lake Fletcher Resort Estates and then runs horizontally to Kinsac Lake. The Board is satisfied that this line reflects the community of interest of Fall River, and follows the natural and historic ties outlined in the Preliminary Decision. The Board recognizes that future development in the proposed District 17 may lead to imbalances in the number of voters in Districts 17 and 14. These Districts will no doubt have to be reviewed after the next municipal election to monitor growth in the number of voters.

The revised boundary between District 20 and the proposed District 17 has been extended to the Bicentennial Highway (Highway No. 102) in keeping with the intent of the Board's Preliminary Decision.

The Board has reviewed the proposed legal descriptions and boundaries noted above in conjunction with the original application and the testimony at the hearing and is of the opinion that the application should be approved. The voter statistics for the 1985 municipal elections in Halifax County were outlined in the Preliminary Decision. In a Municipality which is developing at such a rapid rate, it is imperative that electoral boundaries change to meet the growth in population, to ensure that the principle of representation by population is observed. The Municipality is encouraged to carry out the review process on a continuing basis.

The Board approves the original application as amended. An Order will issue accordingly.

In light of the dissenting reasons that have been filed by Mr. Weldon, it is necessary to make some comment on the issue of a second hearing. In the Preliminary Decision, the Board indicated that the application should be approved (emphasis added) with two minor changes which required the Municipality to submit revised legal descriptions. These revised legal descriptions were received. Several other Municipalities have had to forward copies of the legal descriptions following the hearing. In each of these cases the Board has issued its Decision and Order upon receipt of the legal descriptions without holding a further hearing.

At the time that the Board Members discussed their views on this particular application, it was understood by the Chairman and the Vice-Chairman that although Mr. Weldon felt that the Board should hold a second hearing, he was in agreement that any evidence at the second hearing would be restricted to the issue of the revised legal descriptions.

The original hearing was properly advertised and in addition there were stories in the press about the upcoming hearing. The hearing was well attended and many of those present gave evidence. The Board issued a preliminary decision which in effect granted the Municipality's application subject to two changes. To allow persons who did not attend the first hearing to come forward at a later date and demand to be heard would be to set a dangerous precedent.

DATED at HALIFAX, Nova Scotia, this 29th day of March, A.D., 1988.

Michael G Johnson

MICHAEL G. JOHNSON, C.A.
Chairman

Linda D. Garber

LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

DISSENTING OPINION

I have had the privilege of participating in the issuing of the preliminary decision herein and in reading the draft decision of my fellow Board Members.

This is the first time I have felt the necessity to dissent from a majority Board decision since I came to the Board in April, 1985. Since my dissent is based on matters which concern process by and in the Board, rather than a disagreement in result with the majority decision, I shall take some time to lay the background under which I felt compelled to dissent.

My complaint in this application can, in one phase of understanding, be categorized that the decison of the Board is premature as being based on "evidence" not properly before the Board and therefore the Board could not arrive at the conclusion that it did, when it did. There has been, in my view, a default in the evidentiary process sufficient to make the present decision of the Board at least premature.

Dissents in the Board are rare. Some are rare because only one member at a time sits on the panel. There are with some frequency three-member Board hearings. Occasionally, and not usually by design, there are two-member Board hearings. To my knowledge there have never been more than three Board members sit on one Board, although at times there have been more than three Board members available to sit on one panel of the Board.

At all times material to this application there have been three members on the Board panel herein being all the Board members available.

Dissents are rare in multiple member Board hearings but that does not mean that there are in such cases no differences of opinion as to interpretation of evidence, differences on points of law, and probably other differences as are likely to arise in any group of people who have the diverse backgrounds, education, and experiences as have had the present and past members of the Board. These differences are most always accommodated and rationalized so that the Board most always speaks with a united voice in its written decisions. This implies the existence of an internal decision making process to make such accommodations which seems to be successful in most cases in turning out a decision in which all members can, in good conscience, participate.

While we are dealing with dissents, I will cite two dissents of the Board that I have knowledge of and which illustrate two types of dissent that have been used by Board members in the past. There may be others, but the two I cite will be illustrative of two techniques of dissent which have been accommodated within general Board process in the past.

Re Town of Bridgewater Annexation (1984) 3-B M.B.D. 1[1] , an application under the Municipal Boundaries and Representatation Act as it then existed, heard by a three person Board generated an "unreasoned " dissent by the then Vice-Chairman of the Board, Elizabeth Lawrence. The headnote at p3 of the decision deals with this type of dissent thus: " Note:1. Only 2 of the 3 members of the Municipal Board hearing this application signed the decision. Vice-Chairman

Lawrence did not indicate her agreement." The appeal (of that day) of the majority decision to the Lieutenant-Governor in Council did not succeed. In this case I have, in part, followed this precedent since I have refrained from " indicating ...agreement " to the majority decision by not signing the final decision although I had been satisfied to sign the preliminary decision herein.

Town of Port Hawkesbury v. County of Richmond (1986) 5-B M.B.D. 692 $_2$, also an application under the Municipal Boundaries and Representatation Act as it then existed, in a three person Board generated a minority dissent from Darryl W. Wilson, Board Member(as he then was). Mr. Wilson differed from the majority on substantial matters going to the merits of the application and filed a reasoned dissent, which if followed by the majority of the Board, would have resulted in an opposite result. In part I have followed the dissent process followed by Member Wilson in Hawkesbury $_2$ in that I have given written reasons for my dissent. In so doing I have followed the format used by Member Wilson in Hawkesbury$_2$.

The present dissent differs from that of Member Wilson in Hawkesbury$_2$ in that the present dissent is to the effect that the majority decision is wrong procedurally because it is decided on evidence not properly admitted before the Board and/or decided on evidence not properly before the Board or that other evidence sought to have been put before the Board was not heard (even an application to put that evidence before the Board was not heard) to the extent that the Board's duty to proceed with "due process", natural justice and fairness was not complied with, while in Hawkesbury$_2$ all relevant evidence had been heard. There was no question raised in Member Wilson's dissent to any defects in process.

Member Wilson's position in Hawkesbury$_2$ was that the majority in that case came to the wrong decision on the evidence before it. In this application, my position is that the decision of the majority may easily be correct but the manner in which they arrived at that decision is, in my opinion, so flawed as to vitiate the decison at which the majority arrived.

In such a small number as constitutes our Board, I concur personally with the practice, which has grown up over the years, in decisions of multiple member Boards, to avoid, if at all possible by a process of internal consultation (after all the evidence has been adduced), dissenting opinions. It has been possible over the years not to have any multiple concuring opinions in which practice I, as a Board member, also heartily concur . In a relatively new Board, without fixed traditions, in my view it is important, if there is any general respect to be earned by the Board's attempts to perform its duties properly, that the Board when at all possible try to speak with one voice: in some circumstances unanimity may not be possible.

It is, therefore with great reluctance, that I proceed to differ from the majority in this application.

I have no objection to any of the proceedings herein which gave rise to the Preliminary Decision of January 11, 1988 following upon an evidentiary hearing held sometime prior (at a date not mentioned in the preliminary decision) in the County Council Chambers in Halifax after "due advertisment in the Chronicle Herald and the Daily News."

This preliminary decision said in part:

> " The Board is of the opinion that the application to change the number of polling districts and the number of councillors should be approved provided that the concerns noted above have been addressed.
>
> The Board is issuing this preliminary decision with the intention that the Municipality will review its application and submit revised legal decriptions by February 19, 1988, which will include the Fall River area in the proposed District 17; and which will extend the boundary of District 20 to the Bicentennial Highway."

At the time I signed this decision, it never occurred to me that there would not be a subsequent evidentiary hearing of the Board to entertain the results of the Municipality's review of its application and to entertain the submitted revised legal descriptions to the Board and to subject those descriptions to approriate on-the-record proof and scrutiny.

In order to try to meet certain electoral deadlines of the Municipalities, to refrain from making retroactive findings, and to otherwise perform its own mandate under Section 17 of the Municipal Boundaries and Representatation Act, the Board has been treating March 31, 1988 as its deadline for final disposal of its sextennial polling district review of all polling districts of non-town and non-city municipalities in the Province.

In that light, the Board operates under some time constraints when the first hearing in the process in a given municipality does not generate a final decision from the Board but gets, instead, a preliminary decision which spells out the Board's view of that application to the date of the hearing and casts (usually) some burden on the municipality concerned to take some further action and to get back to the Board within the time mentioned above.

As of the present, the Board is within its own guideline (March 31, 1988) and has issued many "final decisions" followed by "final orders" pursuant to the evidence heard at the first and only evidentiary hearing of the Board in respect to the sextennial review of the polling districts in the municipalities concerned.

The Board has, in some other municipalities, felt the necessity of issuing "preliminary decisions" giving instructions therein to the municipalities concerned and having subsequent evidentiary hearings in those municipalities to monitor the municipalities' response to these instructions and then to issue "final decisions" followed by "final orders" pursuant to the totality of the evidence at the time of the "final decision" then before the Board.

Neither of the two above processes were used in the instant application being processed for the Municipality of the County of Halifax. In the instant application, the Board called for the action on the part of the Municipality as set out above and then proceeded to make a "final decision" and a "final order" without having an interventing evidentiary hearing to entertain, at the very least, the results of its preliminary instructions to the Municipality.

What is worse, in my view, is that in the time interval between the "preliminary decision" and the time of the "final decision" which is contemporaneous with this dissent in its final form, certain persons, apparently residents of the Municipality, attempted to make contact with the Board by telephone and in certain writings (which will be alluded to later) saying, in effect, that they had just become aware of the Board proceedings concerning the electoral boundaries of the Municipality, that they, on becoming so aware, were not happy with the results as they understood them and that they, or some of them, wished to appear before the Board to give evidence concerning the matters which were the subject of the Board's deliberations in this application. The Board, by its "final decision" in this matter, has disposed of the requests of these individuals without so much as giving them an opportunity to be heard (even on the subject of whether they should be heard) while at the same time has taken reports and letters from the Municipality and decided in the absence of an evidentiary hearing to accept the "evidence" tendered by the Municipality of its compliance with the preliminary order.

Conversely, in my view, if there were no evidence submitted to the Board after its preliminary decision, then it had no evidence on which to base its final decision.

It is my view then that the final decision in such a case can be no decision at all. If the Board took evidence from the Municipality subsequent to the preliminary decision herein, other persons who might have qualified to give evidence before the Board should at least have been given opportunity at an evidentiary hearing of the Board to inquire into the evidence so tendered and to apply to the Board, on the record, to give what evidence, if any, they wished to present to the Board.

No evidence was properly taken by the Board, in my view, after the early January meeting of the Board. Attempts to communicate with the Board were made by several groups or persons other than the Municipality (who in the view of the majority had a duty to feed the Board more information). Some of the communication by others was attempted by telephone. Some of the communication was attempted by written documents.

By letter dated January 19,1988, signed by "B. JONES-GORDON Clerk" one Stephen Boyce was written to. The text of that letter, if one can consider it at all, indicates that Mr. Boyce had some concerns as to the redistribution ordered, had been in communication with the Board, and that the Board at the time of writing had need of further information before it could make a final disposition of the matter before it.

By letter dated January 25, 1988 the "Sackville Advisory Board", if one can consider this document at all, wrote to the Board. This letter was on the Board files before a final decision was made and before all information to be supplied by the Municiplaity was received by the Board. Is there any reason, in the absence of any evidentiary hearing designed to exhaust the hearing of evidence, that this letter ought not to have been regarded by the Board in making its final decision as well as any material subsequently submitted by the Municipality? Is there anything in the decision to indicate that it was considered, that it was not considered, that it was even admissible, or that it did or did not have any effect on the mind of the Board members who had not yet heard all the evidence and consequently could not yet have made up their minds. This letter may be taken as innocuous on its face, but it was also, on its face, relevant to the application still under consideration and awaiting, at least, further facts from the Municipality.

Another document falling in the same time slot dated "2 February 1988" addressed to "Ms Garber"[Vice-Chairman of the Board], if one can consider this document at all, purported to be a critique of certain evidence "presented to you at your public meeting". This letter is one page of close type and appeared to accompany a 6 page brief which had been purportedly presented "to the redistribution committee of the Municipality of the County of Halifax at a public meeting on 1 February 1988." The Brief was apparently designed to assist the deliberations which that committee felt necessary to inform itself so that it could respond to the Board's preliminary order herein. It seems to me that his letter and brief of the "Lockview area Ratepayers

Association" might have been just as relevant to the Board as the Municipality's conclusions made after the Committee apparently heard the brief presented. In the absence of an evidentiary hearing on the record, who is to know whether the Board took this letter and brief into consideration in making its final decision and whether or not it should have?

" Michael C.J.Creighton" signatory of that letter appeared to be somewhat apologetic in his letter and, while advocating his organization's views to the Board through Ms Garber, wrote "Please rest assured that our Association will give full support to whatever decision is made."

One Donald L. Rankin, apparently of the Cole Harbour area of the Municipality and purporting to be Chairman, and acting on behalf of, the "Forest Hills Community Association", took issue with the division in his area (Cole Harbour) made by the Municipality and not disagreed with in the preliminary order of the Board. By a letter of February 15, 1988 consisting of two pages plus addenda (if we can even consider this document) had views on the Cole Harbour distribution of council seats and made a request to have his (perhaps his organization's) views heard by the Board in these terms:

> " For any and all of the foregoing reasons that speak in equity, if not in law, I strongly request, on behalf of our Association, that it be given a remedial opportunity to be heard before the Board's decision is made choate."

This request, if not evidence, is at least a "pleading" which seeks an opportunity to apply to the Board on the record to give evidence relevant to the matters at hand and, if the application should succeed, to give such evidence for the consideration of the Board. Mr. Rankin, unlike Mr.Creighton, was not content to go "quietly into the night" and followed up this letter with various phone calls to the Board's offices. Again my problem is how we were to receive additonal evidence from the Municipality as requested without at least giving Mr. Rankin opportuntiy to be heard as requested, or to apply to be heard-on the record. Did the Board, or did the Board not, consider at least the writings of Mr. Rankin when making its final decision? Should the Board have considered the writings, or should it have not?

Regardless of the writings or phone calls, a letter from the Board to Mr. Rankin, dated March 8, 1988 opened "I wish to inform you that the Board will not be holding any more public hearings...."

After this letter was sent to Mr. Rankin, the Board filed its final decision of which this dissent forms a part. After the date of Mr. Rankin's letter to the Board (which received no date stamp from the Board) a letter was received from Mr. Cragg, the Municipal Solicitor, dated February 17, 1988 and date stamped by the Board "Feb 18 1988". This letter was single spaced and one page in length. Attached to this letter was three pages of a report to the Warden and Council dated February 15, 1988 accompanied by some diagrammatic maps, three or four pages of descriptions of districts, a business card of one Tony O'Carroll, planner, and a letter to Councillor McInroy dated February 10,1988 purporting to be from a "Sackville/Beaverbank Advisory Board."

No evidentiary hearing of the Board was held to consider the facts set out in all this material or even, in my view, to bring these matters before the Board. Without question the Board did, in its final decision, rely on at least part of this material to so conclude its final decision on this particular application. My first question is why should the Municipality be allowed to come in with evidence on which the Board was to base its decision when no others were allowed to have a hearing on the record even to apply to have their evidence heard? My second question, related to the first, is how did the Municipality's evidence become part of the record so that the Board could deal with it? And my third question is, what of the mass of papers sent by the Municipality on Feburary 15 should be taken into the consideration of the Board?

What other attempts to influence the Board with more facts after the "preliminary hearing" in this matter, if any, were made I am uncertain but the ones above cited are sufficent , in my view, to give the flavour of the situation surrounding the Board's deliberations between the hearing preceeding the preliminary decision and the granting of the final decision.

My total training and instincts tell me that such selections and exclusions of hearings as outlined above run contrary to any proper mode of conducting the Board's affairs to ensure the proper disposition of the application before it. In my view the Board cannot consider any facts that have not been put before it in evidence while the Board is acting in its "evidentiary mode"i.e. at a public hearing on the record made after appropriate notice to any persons who have evinced a sincere interest in the instant proceedings.

Instincts are a good ground for considering a dissent if one cannot sell the instincts to other Board members and thus become part of an unanimous decision, or, failing that, part of a majority decision. There now remains to be seen whether the results from applying the instincts are soundly grounded in the applicable law.

I note at the beginning of the legal analysis that I shall soon attempt that the Board performs three main functions in descending order of volume: matters under the Planning Act, matters under the Assessment Act, and matters such as this one under the Municipal Boundaries and Representatation Act. In a spectrum of tribunal function form purely administrative to purely quasi-judicial (if such a spectrum is still legally fashionable) I concede that the applications under S. 17 of the Municipal Boundaries and Representation Act are usually more "adminsitrative" than the Board functions usually performed under either the Planning Act or the Assessment Act. Most functions performed by the Board under the last two statutes are, and are intended to be, highly adversarial demanding a quasi-judicial approach to the matters generated under those statutes. Interpersonal individual rights are most often being addressed in proceedings before the Board in proceedings under both the Planning Act and the Assessment Act.

In most cases of Section 17 applications under the Municipal Boundaries and Representation Act no specific individual rights are being adjusted, merely the general right of inhabitants of a municipality to receive equality of represention or the best approximation of such that circumstances will permit. Section 17 applications under the Municipal Boundaries and Representation Act work best, and in my view are intended by the Legislature to work best, when the Board by the persuasion of its pending redistribution appears with the inevitability of the passage of time, gives the impetus to the Municipality to use its local knowledge to perfect a scheme of redistribution (if necessary) which will appeal to fair minded impartial observers [in this case the Board]. The Board provides the goad, and, in the most of cases, the municipality concerned provides the valid local information and the result is most often a proper redistrbution of the representation of the electorate if that is required.

This sought after cooperation of the Board with the municipality concerned is more nearly administrative than the proceedings under the Planning Act and the Assessment Act. In matters under the Planning Act and the Assessment Act, the Board functions most like a judge or referee between contending parties before it on the initiative of one or more of the parties, while in applications under Section 17 of the Municipal Boundaries and Representation

Act the Board is more likely to be working together with the municipality more like a participant than like a judge or referee.

Having said all that, the Board conducting Section 17 hearings under the Municipal Boundaries and Representation Act hears evidence on the record before advertised public hearings at some of which the public (as well as the applicant municipality) attend to actively participate by giving evidence and argument on the record. The function performed by the Board in Section 17 applications under the Municipal Boundaries and Representation Act are in some respects quasi-judical in every case.

The statutory paper chain of the Section 17 applications under the Municipal Boundaries and Representation Act, in my view, can be adequately summarized as follows:

I. The Municipal Board Act:

" 4 The Board shall

> (a) perform such duties as are conferred on it by this Act,...the Municipal Boundaries and Representation Act... .
>
> (b) have such other powers and duties as are conferred upon it by an enactment... .

Board and each members has all the powers, privileges and immunities of a commissioner appointed under the Public Inquiries Act.

24 (1) Unless otherwise ordered, the Board shall hear all matters before it in or near the municipality affected by the application, appeal or other matter or proceeding.[emphasis mine]

26. Notwithstanding the provisions of the Municipal Boundaries and Representation Act, where two or more municipalities agree to a change or settlement of their mutual boundary...and where no objections have been received

by the Board, the Board may by order confirm the change or settlement of the boundary without a hearing.[emphasis mine]

(From this section I was helped to draw the inference that all other applications under the Municipal Boundaries and Representation Act, especially where objections have been received by the Board before all the evidence necessary for the Board's decision was in, must have a hearing on the record.)

27(3) Any person may appear and give evidence on any matter before the Board, but may not participate in the hearing except as permitted by the Board.

(4) The Board shall permit any person who demonstrates to the Board that he has a real and substantial issue in the subject matter of the proceeding to participate in the hearing.

29 In any matter before it, the Board shall grant an order, either as specified in the application or notice of appeal or as the Board decides, and may by order dismiss the application or appeal.

32 (1) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it.

(2) The Board as to all matters within its jurisdiction under this Act has authority to hear and determine all questions of law or of fact.[emphasis mine]

39 A full and complete record shall be kept of all proceedings before the Board and all testimony shall be recorded.

40 (1) Any information provided to the Board by any person with intent that it influence the decision of the Board with respect to any application, appeal or other matter or proceeding before the Board, shall be provided to all parties to the application...by the person providing the information or by the Board.

(2) Any information not so provided to all parties may not be relied upon or used by the Board in coming to its decision.

42 (1) A decision of the Board shall be in writing and shall set forth reasons for the decision.

II. Municipal Boundaries and Representation Act

3 The Nova Scotia Municipal Board, as constituted from time to time under the Municipal Board Act, is the Board for the purposes of this Act.

4 Except where inconsistent with this act or the regulations, the provisions of the Municipal Board Act relating to the constitution , powers, procedures and practices of the Board apply to and with respect to the Board when acting under this Act.

5 The Board has jurisdiction to hear applications and to make orders for or relating to

(d) the division of municipalities into ... or polling districts;

(e) the determination of the number... of councillors for ... polling districts;

(f) the alteration or change of boundaries... of polling districts in other municipalities with a view to ensuring fair representation on councils having in mind, among other things, population densities, community of interest and geographic size of ... polling districts;

(g) the dissolution of... polling districts in municipalities;

(l) any other matter or thing with respect to which jurisdiction is conferred upon the Board by or under this Act or any other general or special Act;...

(m) any other matter or thing incidental to or consequential upon the exercise by the Board of any jurisdiction or power conferred upon it.

16 (1) Notwithstanding the provisions of any general or special Act, upon the application of... a municipality authorized by a resolution of the council thereof...the Board by order may

(b) divide or redivide a municipality, other than a city or a town, into polling districts.

(c) amend the boundaries of any...polling district;

(d) dissolve the ... polling districts of a municipality;

(e) determine the number of ... councillors for each... polling district;

(f) determine the date upon which the division, redivision, amendment or determination shall take effect.

17 During the year 1987 and during each sixth year thereafter the council of each municipality other than a city or town shall cause a study to be made of the number and boundaries of the then existing polling districts in the municipality and the fairness and reasonableness of the number of polling districts and of the number of councillors to be elected from each, and before the end of the year in which the study is made shall make an application to the Board either for confirmation of or approval of changes in

the number and boundaries of polling districts and the number of councillors to be elected from each polling district.

(This section is the section which triggered the present application to the Board by the Municipality of the County of Halifax.)

19 An order of the Board made pursuant to Section...17...may determine the number and boundaries of... polling districts and the number of... councillors to be elected from each... polling district either as specified in the application or as the board decides.

25 Notwithstanding the provisions of this Act, where two or more municipalities agree to a change in or settlement of their mutual boundary...where no objections have been received by the Board, the Board may confirm the change or settlement of the boundary without a hearing.[emphasis mine]

44 In and by an order...altering the boundaries of... polling districts in a municipality...or in a subsequent order or orders, the Board may

(e) where not otherwise provided for make provisions for the composition and membership of councils...

(g) do or cause to be done all such matters, acts, deeds and things as in the opinion of the Board are necessary or incidental to the carrying out of the ... change of boundaries... provided for in the order;

(h) make rules and regulations and issue such orders and directions in respect of any matter not specifically provided for in this Section as it considers necessary or desirable with the ... alteration of boundaries... .

46 (2) The Board may instead of making an order final make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application.

(3) The Board may make an order granting the whole or part only of an application or may grant such further or other relief in addition to or in substitution for that applied for as it deems just and proper. [emphasis mine]

III PUBLIC INQUIRIES ACT R.S.N.S., 1967, Chapter 250

3 The ... commissioners shall have the power of summoning ...witnesses...requiring them to give evidence under oath orally or in writing...as...the...commissioners deem

requisite to the full investigation of the matters into which...they are appointed to inquire.

4 The...commissioners shall have the same power to enforce attendance of ... witnesses and to compel them to give evidence...as is vested in the Supreme Court or a judge thereof in civil cases, and the same privileges and immunities as a judge of the Supreme court of Nova Scotia. [emphasis mine]

IV EVIDENCE ACT R.S.N.S., 1967, Chapter 94

1 In this Act
  (b) "court" includes any person having by law or consent of parties authority to receive evidence;
  (d) "witness" includes parties to an action when entitled or compellable to be examined.

56 A (1) In this Section,
  (a) "legal proceeding" means any civil proceeding, inquiry, proceeding before any tribunal, board or commission...in which evidence is or may be given, ..."

I am of the opinion that the above recitation of statutory law forces me to the opinion that this Board must arrive at its decisions by considering, and considering only, the facts brought before it in evidence while it is acting in its "quasi-judicial evidentiary" mode.

Due to time constraints, the general futility of a dissent, and the absence of any counsel or other party to advocate anything contrary to the Municipality's position, I have not canvassed the CANADIAN CHARTER OF RIGHTS AND FREEDOMS for any support for my dissent herein. I am merely saying that I have not considered the CHARTER when preparing this dissent. That is not to say that the CHARTER might not mandate another result in this application.

Due to time constraints and the general futility of a dissent, I have not canvassed the line of English and

Canadian cases dealing with the doctrine of"fairness" but I note a commentary *The Duty to Act Fairly after Nicholson* (1980) 25 McGill Law Journal 25 [3]. I will make but a few quotes from that article by Professor Julius H. Gray of the Faculty of Law of the McGill University:

"[p601] The right to make representation prior to a final decision, and to know the complaint being made, have been consistent aspects of fairness in British jurisprudence.

...

[p602] The purpose of the "duty to be fair" is to allow the individual a chance to explain himself and to give the deciding body the capacity to make its decision on the fullest information.

...

[p606 and wrenched out of the context:You would have to read the whole section of the commentary to get the full flavour thereof] Fortunately, the Supreme Court judgment overturned this reasoning.[no *certiorari* relief for administrative decisions] ... Mr. Justice Pigeon recognized what appears to be the logical solution, that *certiorari* should be available for challenges to purely administrative decisions on the grounds of fairness. A concuring minority opinion by Mr Justice[p607] Dickson [as he then was] went even further by adopting the English view of certiorai as an expanding remedy. He added:

> 'In my opinion,*certiorari* avails as a remedy wherever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person.'

The implication of this is that the distinction between administrative and quasi-judicial matters should lose its significance, apart from the question of court jurisdiction imposed by statute."

One case citation of the application of fairness may be found in the decision of the Federal Court *Crestpark Realty Limited v. Minister of Transport (Director General Aids and Waterways)*Federal Court, Trial Division T-2068-86 [4] (filed appeal withdrawn, unreported?). In that case the responsible public officer had published an advertisement asking for objections in writing from persons who opposed a project over which that responsible public officer had a power to grant an enabling permit. His refusal to grant that permit would have effectively stopped the proposed project. In filing her written objections with the responsible public officer, the solicitor of the Plaintiff included in her letter a concluding phrase of this import: "Would you kindly inform me of the date of the Hearing of this matter?"

The statute under which the responsible public officer was acting and its ancillary regulations made no provision for any hearing, public or otherwise, and gave the official no apparent guidance or list of criteria by which he should judge the application before him or any objections to that application. In a time shortly before the contested permit was granted (too late for any approriate response by the Plaintiff's Solicitor) the responsible public offical informed her by letter that the permit was granted.

The Plaintiff applied for certiorai in the Federal Court,Trial Division to quash this permit. By so applying the Plaintiff conceded that the decision complained of was administrative since the Federal Court Act required certiorari applications from judicial and quasi-judicial decisions to be made to the Appeal Division of the Federal Court.

Starting at page 3 of the file copy of the report of the oral decision of Collier J. the reasons for his decision become apparent:

" The applicant's [Plaintiff's] objections, and requests, [my emphasis] were not even given the courtesy of an acknowledgement receipt. There was utter cold silence until the Director General wrote the applicant's solicitors on January 2, 1986. That letter referred to the solicitor's letter of October 25, 1986 [sic, should be 1985] . The Director General indicated the objections would not be given effect to, for withholding approval under the statute.

The letter was dated one day before the decision for granting formal approval was made. The letter was not received by the applicant's solicitors until January 9, 1986.[p4]...The material filed on behalf of the respondent discloses Mr. Bradley made his first official site inspection on September 17, 1985. He made another inspection on November 26, 1985. Mr. Bradley does not say why this second inspection was made. He does not say it was because of the applicant's objections, or because of the opposition which had been expressed by other objectors.

This is clear. The applicant knew nothing [my emphasis] of [p5] these matters.

...

The applicant contends that the respondent was, in the circumstances here, in breach of a duty of fairness: That some kind of hearing, or opportunity, ought to have been given in respect to the objections made by the applicant.

The respondent replies that there is no statutory requirement for this so-called hearing. Even if a common law duty of procedural fairness arose, it is said, the requirements were met; the objections were considered, and investigated; in the circumstances that was all that was necessary.

I do not accept the respondent's contentions.

...

Quite apart from statute, a duty of fairness may arise, in the circumstances of a particular case, at common law. The duty of fairness may, again in a particular case, require a hearing, in the sense of an oral hearing.

Essentially the complaints made to an investigating or deciding body, must be considered.

...

[p8] No opportunity was given to the applicant to respond to the rejections, or even of the grounds of rejection.

Failure to give that opportunity was, to my mind, a breach of fairness, sufficently tainting the approval of the decision, to warrant quashing it."

This decision made reference to several decisions on fairness. If I were to rely on this ground as the sole basis, or even a basis, of my dissent perhaps I would read them again. I merely point out that there is some authority to force a body to hold a hearing at which the complaints made to an investigating or deciding body must be considered. I am not excluding the fairness doctrine from my consideration. I merely say that it might perhaps be considered, but that I am not sufficently at ease with all aspects of the doctrine to found my dissent solely on this "fairness doctrine".

Three Star Developments Limited v. County of Halifax (1986) 5-B M.B.D.290$_5$, a planning appeal decision made by the Board, as part of its reasoning process, analyzed the function of the Board. At page 337 of that decision there is a topic called " 'RESPECTABLE' VIEW OF THE PURE MEANING, IN ENGLISH ALONE OF 'COURT OF COMPETENT JURISDICTION'" followed on p338 by another topic "BOARD FUNCTIONS LIKE A COURT". I do not propose to repeat the reasoning in that decision here but I endorse it and say it is authority for my opinion, as expressed in this opinion, that the Board functions so closely in a manner to a conventional court in the matter of taking evidence and the making of decisions based on that evidence that it is very difficult to discern any substantial difference.

I believe that I can find authority much closer to home to support my position. Cummings v. Director of Assessment (1986) 5-A M.B.D. 26$_6$, although a decision on an assessment appeal, is particularly germane to this present opinion. The following statements from Cummings $_6$ are, in my view, to be regarded:

"[from the headnote] -HEARING PROCESS- ...The Board does not permit new evidence or facts to be submitted through a brief. These must be presented under oath and subject to rebuttal in an open hearing. ... the Board will not consider this agreement filed after the conclusion of the evidentiary portion of the hearing as it was then inadmissible evidence.... [text of decision p29]

" GENERAL BOARD PROCEDURE

Both parties filed briefs and from the general text of the Appellant's brief it is clear that the Appellant, despite advice of the Director's Solicitor and, indeed, despite advice of the Board itself, may have misunderstood the directions of the Board concerning the briefs and how the Board uses briefs in arriving at a decision. On page one of his brief, Mr. Duplak voices a concern:

> **' It was not my understanding that the purposes of the brief to be filed by the Appellant...was to provide him with an opportunity to introduce new evidence in the matter.'**
>
> Exactly!

Since there may have been a misunderstanding on the part of the Appellant, an analysis of the Board's process may be in order.[p30]

An inferior tribunal, the Board must still proceed in accord with the general principles of natural justice and 'fairness'. In the context of this appeal, that means:

> 1.The case must be decided by the Board on evidence properly admitted before the Board.
>
> 2. The evidence properly before the Board must be that evidence which has been introduced by a party at an open hearing on the record by and through a witness available to be cross-examined on his evidence by the opposing party.
>
> 3. The briefs...were not opportunities to adduce new evidence of any nature-not to say that new evidence might not be relevant or not to say that such new evidence might even be true. Such late evidence has not been tested, as is required in our legal system, in the crucible of an open on the record hearing before an impartial adjudicator, and has not been subjected to the acid test of cross-examination and/or the antidote of rebuttal. ...

[p 31] Thus our legal system deals not in ideal solutions but in finite ones. A day, a place and a time is set for the hearing. All parties are required to be ready at that time, place and day. The person initiating the proceedings has a burden to adduce evidence, at least to commence with, and the process continues under varying rules until finished on the record, under oath, before an unpredetermined but finite time. It is a case of 'now or never' for evidence. Each party has ample opportunity to adduce evidence until he signifies he has no more (or in extreme cases when, in fact, the adjudicator finds that he has no more): When all parties are finished, the evidence-taking aspect of the hearing is closed. Argument on that evidence proceeds and a decision based on the

> applicable law and that evidence, and that evidence alone, leads to a decision. The ability to adduce evidence ceases when the evidence portion of the hearing is concluded. The parties positive input ceases when they have finished their arguments, and the decision maker retires to contemplate the evidence, to digest the argument, and to arrive at his decision. The decision maker can only contemplate the specific pieces of evidence put before him. ...
>
> There is no room in the system for a party, having[p32] had ample time to prepare, to call more evidence once his evidence has closed. If, while a hearing is underway, a party sees the need to call evidence other than he has presently available, he is free to request an adjournment which may or may not be granted... .
>
> This appeal and, the Board hopes, all other cases in our legal system, will be decided by an an impartial adjudicator in accordance with the applicable law upon relevant admitted evidence made upon the record in the manner set out summarily above. ...
>
> [p37] If he wishes to rely on the alleged document to build footings for his appeal he must prove it the time and place allowed for such proof....
>
> [p79] but the rest of the information is novel and cannot be introduced at the brief stage of[p80] this appeal as is here attempted by Mr. Cummings....
>
> [p81] they were not made available during the time for hearing of evidence...
>
> [p82] In that light the action of the assessor and of Mr. Duplak were appropriate to the conditions and the request for information by the Appellant were decidedly inappropriate given the explanation of the general operation of the judgemental system followed by this Board and similar tribunals....
>
> [p83] It is exactly the situation where the 'crucible ' test set out above by the Board clearly applies."

To me the findings in Cummings[6] are a statement of trite law regarding the conduct of hearings. This view as to the elementary nature of the procedural guidelines for this Board as laid out in Cummings[6] is reinforced by the summary of the case published in Nova Scotia Law News Vol 12, No. 5 (pages 65 to 84) ISSN 0316-6325 p80[7] where the decision was interpreted by the editor of that publication to mean:

" The decision includes a description of the procedures of the Municipal Board and comment on what is legitimate...and what is not, directed primarily to lay appellants."

It is clear to me that the Board needed, at the very least and regardless of any intervention by any parties other than the Municipality, for its final decision descriptions of certain polling divisions located in the Sackville area of the Municipality.

In my view, those descriptions were matters of fact which, for all the reasons stated above, could only come before the Board as evidence when the Board was sitting in its "evidentiary mode."

In all justice, those descriptions might not have been correct or might not have been in the form the Board had preconceived in its preliminary decision that they should be. Those descriptions should have been presented at a hearing at which their perpetrator could have explained under oath what they represented and vouched for their accuracy. This, of course, was not done and has not yet been done to this day. In my view these descriptions are not admitted in evidence before the Board.

As they are not before the Board, the Board's final decision herein is, in my view, premature and founded on something other than evidence admitted before the Board. The majority decision of the Board does not address the other material in the files of the Board which was also not put before the Board in any "evidentiary mode" hearing of the Board. I can see no reason to accept some unproven facts from one set of documents and not from another set of documents appearing in the Board files in the same relevant time period. I can see no reason to deal with the description part of the municipality's material and to not deal with the material accompanying it. None of this material has been put to ther "crucible test" above refered to and was not subjected to the "acid test" contained in the same reference and certainly did not receive the "antidote" of rebuttal. It is not enough to say that all this material is before the Board and that the Board used some of it in its final decision and didn't use the rest. In my view, as a matter of law, none of the above information is properly before the Board.

Since, in my view, the Board had to reconvene in its "evidentiary mode" at least to admit the ordered descriptions, it had not yet ceased the evidentiary portion of its decision making process. This was not necessarily a case, as happened in Cummings [6], where the "evidentiary mode" of the Board had ceased. The argument or decision making modes of the Board had not yet superseded the ability of the Board to take further evidence in the applicatrion.

The Board knew that several parties were interested in the specific area reserved by the Board for future discussion in the Sackville area. It had been brought to the Board's attention that in another "unreserved" area of the Municipality a person had filed a "pleading" asking to be heard on the matter of Cole Harbour. The Board was still, at least for some purposes, in its "evidentiary mode" when it had to hear some evidence.

In my view, it should have set a short hearing date, short noticed the Municipality, all persons who independently appeared at the original Board hearing, all of the persons who approached the Board subsequent to the Board's previous hearing (publicly advertised the short notice if there were time) and held another evidentiary hearing .

At this second hearing the Board, on the record, should have allowed the Municipality to introduce its descriptions and then dealt with anyone who appeared pursuant to the notice to make such applications, on the record, as each of the persons present deemed appropriate for himself. If on those applications, the Board deemed it suitable to add further parties and/or hear further evidence on any matter tendered to it, to hear, on the record, such evidence as the Board found to be appropriate in the circumstances and thus to complete properly, in my view, the "evidentiary portion" of the hearing of this application.

The Board may or may not have heard from Mr. Rankin. Mr. Rankin, had he attended pursuant to notice, at least would have had an opportunity to apply to put his positions before the Board. If the Board heard him it could have dealt with his evidence along with all the other evidence before it on the record. If the Board did not grant him hearing rights, and he didn't agree with that finding, he might have been in a position to apply for leave to appeal from the Board's decision. Given the present decision of the Board, I find it difficult to see that Mr. Rankin has any right to apply for leave to appeal under the Municpal Board Act.

In short I am of the opinion that the present decision of the Board is premature. I am of the opinion that the Board must come to a final decision only after hearing all the evidence it must hear to arrive at that final decision. Consequently I would:

1. reconvene the Board in its "evidentiary mode";
2. short notice, for that hearing, the persons listed above;
3. at that hearing take the "ordered" evidence from the Municipality;
4. hear each and every application presented at that hearing that has come to the Board's attention up to the opening of this reconvened hearing;
5. finish whatever evidence taking, if any, those applications engender;
6. bring the evidentiary portion and the argument portion of the Board's process of this application to a finite end as soon as circumstances permit.
7. having done that then bring the Board's process to its end by filing a final decision herein and seeing to the issue of the final order pursuant to that final decision.

Dated at Halifax, Nova Scotia this 29th day of March, A,D. 1986.

Richard L. Weldon

Member

SCHEDULE A

1 Re Town of Bridgewater Annexation (1984) 3-B M.B.D. 1

2 Town of Port Hawkesbury v. County of Richmond (1986) 5-B M.B.D. 692

3 The Duty to Act Fairly after Nicholson (1980) 25 McGill Law Journal 25

4 Crestpark Realty Limited v. Minister of Transport (Director General Aids and Waterways) Federal Court, Trial Division T-2068-86 (unreported?)

5 Three Star Developments Limited v. County of Halifax (1986) 5-B M.B.D.290

6 Cummings v. Director of Assessment (1986) 5-A M.B.D. 26

7 Nova Scotia Law News Vol 12, No. 5 (pages 65 to 84) ISSN 0316-6325 p80

RE: MUNICIPALITY OF EAST HANTS

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS- MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

In 1982, P.U.B. decision noted that there was a voter imbalance in certain polling districts in the Municipality. Council in preparation for review, held public meetings and had obtained a demographic report from its planner. Applied to change polling district boundaries to add two additional councillors. The average ratio of councillor to voter prior to the change is 1-886. After the change it would be 1-767.

HELD: The Board approved the application.

The Board expressed some concern that there would be a voter imbalance remaining in districts 4 and 7 even after the application was granted. Districts 12 and 1 were the fast growing areas.

Municipality is attempting to come to grips with urban/rural/nature of its polling districts and the current proposal is the best proposal devised to date to deal with the problems. The application represents a good first step towards more equal representation, and addresses at least two of the problem areas mentioned in the P.U.B. decision.

The Board is concerned that the number of councillors will be increased from 13 to 15. In its next application, the Municipality should consider amalgamation and redividing certain districts to better equalize the population rather than simply adding councillors.

The Board expects Council to cause a study to be taken and make another application to the Board on boundary redistribution prior to the 1991 municipal elections.

NSMB-32-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE DISTRICT OF EAST HANTS** for the approval of certain changes in the number and boundaries of the Polling Districts, and for changes in the Number of Councillors to be elected in the Municipality.

BEFORE: LINDA D. GARBER, Vice-Chairman.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE DISTRICT OF EAST HANTS** (hereinafter referred to as the "Municipality") for the approval of certain changes in the number and boundaries of the Polling Districts in the Municipality, and the number of Councillors to be elected was heard in Milford on January 25, 1988, after due public advertisement in the Chronicle Herald and the Weekly Press.

Mr. Robert Carruthers appeared as counsel for the Municipality, together with the Warden, Dr. James Snow, Mr. Neville Glover, Chief Administrative Officer, Councillor Joan McLellan, Chairman of the Law Amendments and Boundaries Committee, Richard Trefry, Councillor for District 12, Mr.

Frederick L. Kenavan, resident of District 12 and a former Councillor, and Mr. Brad Hodgins, Planning Co-Ordinator.

The Municipality requested in its application that two minor changes be made, one involving only one property which was located near the boundary between Districts 3 and 4. This property although technically in Milford, (District 3) receives water and sewer services and is considered to be part of the community of Shubenacadie, (District 4). The second minor change was in District 2, Elmsdale, where the boundary line between Districts 2 and 10 divided the Balnan Subdivision. The change would see the subdivision placed entirely in District 2. A further change in the District was requested to extend District 1 into part of District 2 to allow residents on the Enfield to Nine Mile River Road to be clearly part of District 1, Enfield. The Board agrees that these changes are appropriate on the basis of community of interest.

The major changes requested by the Municipality involve the addition of two new Councillors for Enfield and Mount Uniacke. The Municipality held public meetings in these areas, and though they were not well attended, they generated support by way of petitions in favour of additional representation.

The 1985 voter statistics for the Municipality were as follows:

POLLING DISTRICT	VOTER POPULATION	VOTER VARIATION FROM AVERAGE	VOTER % VARIATION FROM AVERAGE
1.Enfield	1369	483	54.5%
2.Elmsdale	793	(93)	(10 %)
2A.Lantz	748	(138)	(15.5%)

3.Milford	895	9	0 %
4.Shubenacadie	1140	254	28.6%
5.Maitland	542	(344)	(38.8%)
6.Noel, Densmore	707	(179)	(20.2%)
7.Walton	469	(417)	(48 %)
8.Kennetcook	601	(285)	(32 %)
9.Noel Road/ Upper Kennetcook	661	(225)	(25 %)
10.Nine Mile River	937	51	5.7%
11.Rawdon	931	45	5 %
12.Mount Uniacke	1724	838	94 %

TOTAL: 11,514

AVERAGE: 886 (Voters per Councillor)

The Board noted that the worst variations from the average voters per councillor occurred in District 12, Mount Uniacke, which was 94% over the norm, and in District 1 which was 54.5% over. The changes proposed by the Municipality should address the problems in these areas, however, the Board expressed concern that Districts 4 and 7 would still have large variations from the norm after the change. The testimony of the Warden and the Chairman of the Law Amendments Committee indicated that further changes would be forthcoming from the Municipality to the Board prior to the 1991 elections, and that the councillor from Shubenacadie (District 4) had already expressed concern that the district would be under-represented. Shubenacadie at the present time, has a variation of 28.6% above the average, but this variation could be increased to as high as 48% if two new councillors are added to Mount Uniacke and Enfield.

The excellent report of the Planner, Mr. Hodgins, indicated that Districts 12 and 1 are growing at a faster rate than other areas of the Municipality. His statistics indicate that Mount Uniacke increased its residents by 4.7% per year over the period from 1981 - 1986, and that Enfield increased by 4.2% per year. These increases are predicted to continue.

The testimony of many witnesses at the hearing was that the Municipality was attempting to come to grips with the urban/rural nature of the Polling Districts and that the proposal submitted was the best one to be devised at this time. One witness noted, however, that in these days of all-weather roads, and good communication systems, considerations of community of interest and geographic area should be secondary to the primary principle of representation by population.

In the decision of the Public Utilities Board on East Hants, dated January 8, 1982, it was noted at page 6:

> "The Board is concerned, however, that the number of voters in at least four polling districts, namely 1, 5, 7 and 12, varies considerably from the average number of voters per polling district. To take the worst three cases, District 1 is 40.5% above average, District 12 is 78.9% above average and District 7 is 38.9% below average. While the Board is prepared to give due weight to geographical factors, community of interest and 'rural/urban' considerations, such extreme variances cannot be allowed to continue indefinitely. The Board has observed on many occasions that if representative government is to have real substance, it is highly desirable that each elector's vote be approximately equal in value."

The Board has carefully reviewed the application of the Municipality and has concluded that it represents a first step towards more equal representation. The Municipality has addressed at least two of the problem areas noted in the 1982 decision. The Board is concerned, however, that the number of councillors will be increased from 13 to 15. Using the 1985 statistics, 15 councillors would each only represent

767 voters. While this average will be higher in 1988, given the population increases, the Board is of the opinion that in its next application, the Municipality should give due consideration to amalgamating or redividing certain districts to better equalize the population, rather than simply "adding councillors". On the basis of the evidence presented, the Board is anticipating that the Council of the Municipality will cause a study to be undertaken and will make an application to the Board prior to the 1991 elections.

The Board concludes that the Municipality's application as presented should be approved, amending the boundaries and increasing the number of polling districts and councillors to 15.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 12th day of February, A.D., 1988.

Linda D. Garber
LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

RE: MUNICIPALITY OF THE DISTRICT OF WEST HANTS

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-
MUNICIPAL BOUNDARY AND REPRESENTATION ACT, S. 17.

In the previous P.U.B. review there had been major changes within the numbers and types of representation in the Municipality. The changes had worked well. Application for changes in certain boundaries but for no changes in the number of districts or the number of Councillors.

HELD: The Board approved the application.

The proposed revisions would more evenly distribute the representation among the polling districts as a result of the recommendations.

The Board is satisfied the Municipality has duly considered geographic area, community of interest and population density in arriving at its boundary realignment.

NSMB-33-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE DISTRICT OF WEST HANTS** for the confirmation of the Number and approval of certain changes in the Boundaries of the Polling Districts, and for confirmation of the Number of Councillors to be elected from each Polling District.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE DISTRICT OF WEST HANTS** (hereinafter referred to as the "Municipality") for the confirmation of the number and approval of certain changes in the boundaries of the Polling Districts in the Municipality, and for confirmation of the number of Councillors to be elected from each was heard in Windsor on December 18, 1987, after due public advertisement in the Hants Record.

Mr. William Clancey appeared as counsel for the Municipality, together with Warden Gary Cochrane, Mr. Roy Haley, Municipal Clerk, and Councillors Walter MacLean and Ms. Pat

Goldthorpe.

The Municipality assigned the task of reviewing the fairness and reasonableness of existing polling districts and representation to the Administrative Committee of Council.

The voter statistics for the Municipality for 1985 were as follows:

POLLING DISTRICT	VOTERS	VOTER VARIATION FROM AVERAGE	(VOTER) PERCENT VARIATION
1.Summerville-Kempt	1052	43	4%
2.Avondale-The Burlingtons	1084	75	7%
3.Brooklyn-Scotch Village	1245	236	20%
4.Ste.Croix-Ellershouse	1233	224	20%
5.Newport Station-Sweets Corner	667	(342)	(33%)
6.Martock-Three Mile Plains	969	(40)	(3.9%)
7.Three Mile Plains	719	(290)	(28%)
8.Upper Falmouth-Windsor Forks	1011	2	1.9%
9.Falmouth-Mt. Denson	1099	90	8.9%
TOTAL:	9085		
AVERAGE:	1009 (Voters per Councillor)		

All the polling districts come within a ±33 1/3% variation from the average number of voters per councillor which is the guideline being used by the Board wherever possible to ensure voter equality.

The Municipality approved changes in the boundary lines of certain polling districts, mainly to clear up problems that were encountered in the two elections since the last review in 1981, and to make the districts more even in population. Other minor changes have been incorporated in the application to clear up problems with legal descriptions.

In the last polling district review, the Public

Utilities Board granted Council's request to reduce the number of councillors from thirteen to nine, and all dual districts were eliminated. The number of polling districts was increased from seven to nine.

According to the testimony of the Warden, this system has worked out quite well, however, there have been some areas which have seen growth in population and in the number of housing starts.

At the hearing on December 18, 1987, an addendum was added to the original application which further changed the boundaries between Districts 4 and 5. The original application had been approved by Resolution of Council on December 8, 1987. The change to the application, as contained in the addendum, was approved by Council subsequent to the hearing, by Resolution dated January 12, 1988.

The original application was to have the boundary between Districts 4 and 5 follow Highway 101, and thus remove some voters from District 4. Council felt that this would split communities on either side of the Highway and in retrospect, decided to follow Thumb Hill Creek and Old Highway No. 1 to better preserve community of interest.

While at least one councillor, Ms. Pat Goldthorpe, had concerns about the nature of the last-minute changes in the application, she agreed that in this case it was acceptable.

As indicated in the voter statistics, District 5 has the fewest voters, and by this application District 5 is being enlarged to give the population a better balance. The proposed changes will not impact on District 4 that greatly as the intent of Council was to preserve community of interest wherever possible and only a very small number of voters will be transferred to District 5.

District 5 will be increased by the addition of portions of District 3 and 7 and the small portion of District 4 noted above. The Clerk estimated that approximately 90 dwelling units will be moved from District 3 to District 5.

District 6, the Martock - Three Mile Plains area is next to the Town of Windsor and has a fairly large community. It would lose approximately 85 dwelling units to District 7 under the proposed changes.

In addition, the application requests changes that would see District 8 lose approximately 60 dwelling units to District 9. Certain changes to the boundary between Districts 4 and 8 were changed to follow the power line and did not affect any homes.

While the actual number of voters affected in each district was not accurately determined, the Municipality estimated that the population of each household would be 2.67 persons. It was the opinion of the Warden and the Clerk that the population would be more evenly distributed between the polling districts as a result of the proposed changes.

Having reviewed the application and the 1981 decision of the Public Utilities Board, the Board is satisfied that the Municipality has duly considered geographic area, community of interest and population densities in determining the proposed changes and the Board is of the opinion that the application should be confirmed.

The Board hereby approves the application of the Municipality, that the number of Councillors and Polling Districts remain at nine and that certain boundaries of the Polling Districts be changed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 16th day of February, A.D., 1988.

Michael

MICHAEL G. JOHNSON, C.A.,
Chairman.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

RE: MUNICIPALITY OF THE COUNTY OF INVERNESS

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-
MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

Municipality applied to confirm existing polling districts and number of councillors. One councillor for each 934 voters on the average. No public hearings were held. District 6 and District 14 were not within the maximum variation of 33 1/3%± considered usual by the Board.

HELD: The Board approved the application.

District 6 is on the north and the west side of Lake Ainslie. It has the lowest voter population. Its large geographic size warrants the voter imbalance.

District 14 is the old Town of Inverness. The strong community of interest in the former town necessitates a greater deviation from the norm. I, as a whole, is one of the largest municipalities in area. Travel to its remotest parts is difficult in most times of the year.

NSMB-34-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE COUNTY OF INVERNESS** for the confirmation of the Number and Boundaries of the Polling Districts and the Number of Councillors to be elected from each Polling District.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE COUNTY OF INVERNESS** (hereinafter referred to as the "Municipality") for the confirmation of the number and boundaries of the Polling Districts in the Municipality and the number of Councillors to be elected from each, was heard in Port Hood on December 10, 1987, after due public advertisement in the Scotia Sun and Le Courier de Nouvelle Ecosse.

Mr. Harold MacIsaac appeared as counsel for the Municipality, together with Mr. A.A. Murray, Municipal Clerk and Warden Charles MacArthur.

The Municipal Council referred the matter of electoral representation to a Committee composed of Warden Charles MacArthur, Councillor Edward MacDonald and Councillor Donald Matheson.

There were no public hearings conducted by the Committee. It recommended to Council that the number of Polling Districts and Councillors should remain the same, and Council approved this by its resolution of May 7, 1987.

The following are the voter statistics for the Municipality from the 1985 municipal elections:

DISTRICT NO.	DISTRICT	NO. OF VOTERS	(VOTER) VARIATION FROM AVERAGE	(VOTER) PERCENT VARIATION
1	Port Hastings	761	(173)	(18.5%)
2	Judique-Creignish	901	(33)	(3.5%)
3	West Bay	632	(302)	(32.0%)
4	Port Hood	1,089	155	16.5%
5	Mabou	1,056	122	13.0%
6	Strathlorne - West Lake Ainslie	547	(387)	(41.5%)
7	Broad Cove	818	(116)	(12.4%)
8	Margaree - St. Joseph	1,082	148	16.0%
9	North East Margaree	739	(195)	(20.8%)
10	Cheticamp South	1,183	249	26.4%
11	Cheticamp North	1,165	231	24.0%
12	Whycocomagh/Ainslie	1,029	95	10.1%
13	River Denys - Orangedale	646	(288)	(30.8%)
14	Inverness	1,427	493	52.7%
	TOTAL:	13,075		

AVERAGE: 934 (Voters per Councillor)

Most of the Districts are within a maximum variation of 33 1/3% from the average number of voters per Councillor. The exceptions are District No. 6 (Strathlorne - West Lake Ainslie) and District No. 14 (Inverness).

District No. 6 includes the north and west sides of Lake Ainslie, and while it has the lowest voter population, its large geographic size more than compensates for that fact.

District No. 14 includes the exact boundaries of the former Town of Inverness. Even though it borders on District No. 6, it would be difficult to conveniently join a part of District 14 to District 6. The strong community of interest within the former town necessitates a greater deviation from the norm. The municipality as a whole is one of the largest in terms of area and travel to the more remote parts of the municipality is difficult for most of the year.

Having reviewed the application and the testimony at the hearing, the Board is of the opinion that the application should be confirmed and will order that the number and boundaries of the Polling Districts and the Number of Councillors from each District remain the same.

DATED at HALIFAX, Nova Scotia, this 15th day of February, A.D., 1988.

MICHAEL G. JOHNSON, C.A.
Chairman.

LINDA D. GARBER
Vice-Chairman.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD

RE: MUNICIPALITY OF THE COUNTY OF KINGS

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-
MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

The Municipality set a goal of 10%± variation from the norm of 1 councillor for 2384 voters. The Municipality applied to the Board based on this ratio.

HELD: The Board approved the application.

Only two polling districts varied more than the self-imposed goal of 10%± from the voter norm. All variations will be within the 33 1/3%± variation used by the Board as a guideline toward voter equality in reviewing voter statistics in other municipalities.

The changes suggested were of a housekeeping nature. The workload of Council was not excessive for 12 councillors.

The Board commended the Municipality for its excellent application and its attention to the principle of representation by population.

NSMB-19-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE COUNTY OF KINGS** for the confirmation of the Number and approval of certain changes in the Boundaries of the Polling Districts and for confirmation of the Number of Councillors to be elected from each Polling District.

BEFORE: LINDA D. GARBER, Vice-Chairman.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE COUNTY OF KINGS** (hereinafter referred to as the "Municipality") for the confirmation of the number and approval of certain changes in the boundaries of the Polling Districts in the Municipality and for confirmation of the number of Councillors to be elected from each was heard in Kentville on January 18, 1988 after due public notice in the Kentville Advertiser and the Berwick Register, two newspapers circulating in the municipality.

Mr. John Cochrane appeared as counsel for the Municipality, together with Mr. Richard Ramsay, Chief

Administrative Officer, Mr. Robert Elliot, Director of Planning and Mr. Gerald Buchan, Warden of Kings County.

On March 3, 1987, the Municipality commissioned its Chief Administrative Officer and the Director of Planning to conduct a study into the fairness and reasonableness of the number and boundaries of the polling districts and the number of councillors to be elected from each. An excellent study was prepared which recommended that the number of councillors remain at 12, but that certain changes be implemented to better equalize the voter population. The Municipality has attempted to keep all the polling districts within a ± 10% variation from the average number of voters per district.

The 1985 voter statistics for the Municipality were as follows:

POLLING DISTRICT	VOTERS	VARIATION FROM AVERAGE	PERCENT VARIATION FROM AVERAGE
1	2,252	(137)	(6%)
2	2,224	(165)	(7%)
3	2,544	155	6%
4	2,630	241	10%
5	2,568	179	7%
6	2,385	(4)	0%
7	2,174	(215)	(9%)
8	1,865	(524)	(22%)
9	2,345	(44)	(2%)
10	2,484	95	4%
11 (New Minas)	2,676	287	12%
12	2,518	129	5%

TOTAL: 28,665

AVERAGE: 2,389 (Voters per Councillor)

The only districts which exceed a ± 10% variation are Districts 11, the Village of New Minas, and District

8, which is one of the largest districts in geographic area, running from Highway 101 to the Lunenburg and Annapolis County lines. These variations are certainly within the ± 33 1/3% variation which the Board has used as a guideline towards voter equality in reviewing voter statistics in other municipalities.

The Municipality's study reviewed projections of voter populations to December 31, 1986, along with increases in residential units to determine where changes should occur to maintain voter equality for the 1988 elections. It also reviewed communities of interest and geographic areas within the Municipality in making its recommendations.

The proposed changes, which can be described as somewhat of a housekeeping measure, can be briefly outlined as follows:

1. The construction of Highway 101 divided District 4, leaving approximately 252 voters on the southern side of that Highway. The study found that these voters had more in common with the residents of District 9 and should be added to District 9 on the basis of community of interest.

2. Due to shifts in population, District 5 will exceed the 10% variation from the average if no changes are made. The study proposed that a southern portion of District 4, containing 14 voters, and a southeast portion of District 5, containing 122 voters, be added to District

3. The study also recommended a transfer of a portion of the northeastern corner of District 6, containing 104 voters, to District 7. To better identify District 7 boundaries the study recommended that a portion in the southeast corner of District 7 containing 58 voters, be moved to District 6, and that a portion in the northwest corner of District 8, containing 108 voters, be added to District 7.

4. District 9 is predicted to experience population growth and the study recommended that the northwest corner of District 9, containing 98 voters, be transferred to District 8.

The net gain to District 8 under the proposal is 126 voters. As described above, 14 would come from District 4, 122 from District 5 and 98 from District 9, with 108 going to District 7. This addition of voters would reduce the variation in District 8 from 22% to 16%.

The study was approved by Resolution of Council on November 3, 1987. The testimony of Warden Buchan indicated that Council approved the study, and that the workload was not excessive for 12 councillors.

The Board can only commend the Municipality for its excellent application and for its attention to the principle of representation by population. Using the projections outlined in Schedule "F" of the application, all the Districts will be within a ± 10% variation, except for two, which will be less than ± 20% from the average.

The Board is of the opinion that the application should be approved as presented, and an Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 3rd day of March, A.D., 1988.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

TOWN OF LIVERPOOL v. MUNICIPALITY OF THE COUNTY OF QUEENS

MUNICIPAL BOUNDARIES - ANNEXATION - ENVIRONMENTAL CONCERNS - BEST INTERESTS OF THE INHABITANTS - MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, SS. 7; 8; 9; 10; 11; 6; 22(1).

The Town of Liverpool applied to annex 40 acres of Queens County, the adjacent Municipality, for the purpose of a 30-acre subdivision and a 10-acre block for a public school site.

The evidence showed that development in the Town was stagnant and that this annexation was necessary to promote additional residential development. At present the Town had major sewer and water problems that could only be cured by a ten-year plan with financial assistance from other levels of government.

Queens did not really dispute the annexation but did maintain a strong presence in the hearing.

HELD: The Board granted annexation for 3/4 of the area and required the Town to satisfy certain conditions. The Board issued two decisions in the matter.

The Board found the present boundary had been set for a long time and Board should not depart from status quo except for good reason. Board considered Town's need for extra lands, its ability to service the development, financial burdens and obligations of the Town.

To annex the Board must make a positive finding that the annexation is in the best interests of the inhabitants of the area. The Board determined that "area" consists of the annexation area and lands immediately adjacent.

Subject to the environmental concerns, the annexation is both expedient and necessary and in the best interests of the inhabitants of the area.

NSMB-18-86-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Municipal Boundaries and Representation Act, S.N.S. 1982, C. 10, by the **TOWN OF LIVERPOOL** to annex an area of approximately 45.34 acres adjoining the southern boundary of the Town and presently within the **MUNICIPALITY OF THE COUNTY OF QUEENS.**

BEFORE: RICHARD L. WELDON, MEMBER

COUNSEL: JAMES P. DIPERSIO, LL.B., on behalf of the Applicant, the Town of Liverpool;

ANNE CRAWFORD, LL.B., on behalf of the Municipality of the County of Queens.

FINAL HEARING DATE: October 12, 1988.

FINAL DOCUMENTS SENT: October 31, 1988.

DECISION DATE: November 21, 1988.

DECISION: **Application Granted, As Modified.**

DECISION

The Board has had three previous hearings in this matter. The first hearing resulted in a Preliminary Order dated April 15, 1987.

The second hearing resulted in a verbal adjournment Order. The third hearing resulted in the substantial decision concerning this annexation dated March 22, 1988. The decision was embodied in an Order of the Board of the same date.

This additional session was to hear an application by the Town made under the terms of the order of March 22, 1988.

Anne E. Crawford has replaced Gerald B. Freeman Q.C., as solicitor for the Municipality of the County of Queens. Since the last hearing Mr. Freeman became County Court Judge.

The Town called evidence and the Municipality called none. Both parties then made argument. On October 31, 1988 Mr. DiPersio forwarded a letter to Ms. Crawford and the Board. This letter also formed part of the evidence before the Board.

Mr. Dipersio recalled Shirley Nixon, Town Administrator, and Ronald Lane, Town Mayor.

Mr. Nixon testified that on September 8, 1988, the Municipal Affairs Minister approved the Town's 10-year plan, Phase 1, for 50% Provincial funding. The Town has provided its 50% from reserve funds. Phase 1 is a 42-inch sewer extension and will cost about $100,000.00.

Since the last hearing, Mr. Nixon said the Town met with Department of Municipal Affairs personnel and set up a steering committee. The steering committee consists of Town representation and representatives from various departments of the government including Environment and Municipal Affairs.

The Town has authorized a new study from CBCL, an engineering concern. The study costs $51,000.00. The Department of Environment will finance the sewer part of the study. The Town's Water Utility will finance the water part of the study. The Town will levy no direct additional taxes to pay for this study. CBCL's work is before the Board as Exhibit L-42, a "Preliminary Report Sewer and Water Servicing Study". We will call this Exhibit the "lagoon plan".

Mr. Nixon said that the lagoon plan is a fleshing out of the existing 10-year plan referred to in the previous decision.

Mr. Nixon agreed that the ballpark figure for this "10-year plan" is $10,000,000.00. He agreed that most of this cost fell towards the end of the 10-year term.

Mayor Lane testified next. He said the Town and Provincial authorities have enhanced their excellent level of co-operation in dealing with Town problems. Mayor Lane says that the Province has recognized the problem of the Town in producing pure water and adequate sewer services. He felt that the Minister has responded to Town problems to the extent possible under the present provincial municipal system.

Mayor Lane noted that the Town and the Municipality have a joint committee re matters of mutual concern. Through this committee they are continuing their non-confrontational attitude on areas of mutual concern, including this annexation.

Mayor Lane thinks that the Town's water crisis of 1984-85 made the citizens of Liverpool aware of their sewer and water problems. The Mayor says that, overall, these are the most important issues the Town has to deal with.

Mayor Lane admitted that Mr. Nantes' letter was not a guarantee of future funding necessary to complete the 10-year plan. He also admitted that the sewage disposal lagoons were a new concept.

Mr. Nixon had noted that the Town would hold new Council elections on the 15th day of October, 1988. Council Members then elected could not swear their oaths of office until about the end of October. Mr. Nixon said there would likely be a meeting of the new Council called on the third Wednesday in November. He said that the mayor could call a special meeting.

Under questioning by the Board, the Mayor said that he has opposition in the current election. For Council there are 11 candidates for six offices. He said there were seven persons on the present Council including the Mayor. He said that only three have reoffered, himself and two of the councillors. He says there must be at least four new council members out of seven on the new Council.

The Board, in the interchange of argument between counsel, encouraged the new Town Council to lock into a suitable 10-year plan. During that argument, the Board also hoped to conclude this matter if at all possible by December 1, 1988.

In argument, Mr. Dipersio said that the evidence showed significant progress towards a 10-year plan. He said he had presented the best evidence the Town had in support of the application.

Ms. Crawford argued that the Board must make up its mind about the provincial participation. Did the provincial action satisfy the needs the Board had expressed in its March

22nd decision?

Mr. Dipersio said in argument that regardless of the result of this hearing, each party had agreed to bear its own costs.

The Board feels that this decision is merely a continuation of the previous decision. The Board will deal with the application by proceeding with the fifteen provisions of the Order of March 22, 1988.

The Board finds that the Town has not abandoned its application and has filed this present application with the Board. The Town has thus complied with provisions 1 and 2 of the Order of March 22, 1988.

The Board finds Exhibit L-37 is an accurate plan of survey showing the area to be annexed. The description in Exhibit L-38 agrees with the plan of survey. The plan of survey shows that surveyors have monumented satisfactorily the annexation area. These facts, and inference from the facts, satisfy the Board that the Town has met provision 3 of the Order.

Provisions 4, 5 and 6, are the meat of the previous Order.

The Board has perused the new lagoon plan thoroughly and compared it with the previous "10-year plan". Town counsel alleges the lagoon plan is a fleshing-out of the 10-year plan rather than a substitution therefor.

There are three aspects of these two 10-year plans that the Board must consider and deal with.

The first aspect is: "Is there any 10-year plan now available to the Town"?

After the previous hearing the Board felt that the "10-year plan" was an operating plan capable of receiving Council and Governmental approval. If the "10-year plan" ever was an operating plan (which the Board now doubts), it is no longer the plan the governments propose to use. The lagoon plan is not a fleshing out of the "10-year plan". It is (in the view of the Board) a substitutional conceptual plan with some idea of costing.

The Board accepts this lagoon plan and its amalgam with the "10-year plan" as the basis for its considerations. It is this amalgam of plans on which the Board must base its final conclusion in this matter.

The Board feels that the lagoon plan is a usable guide in this annexation application. Changes in technology, governmental imperatives and in the economy make long term precise planning difficult. The Board will give weight to plans which express reachable goals and show political commitment.

The Board will not turn down this application based on the lack of detail in the lagoon plan. It will not reject this application because of differences between the lagoon plan and the "former" 10-year plan. The Town can implement and flesh out the "plan" while soliciting provincial and federal governmental support.

Because of the small size of the annexed area in relation to the provincial context and in relation to the two Municipalities, the Board will, in this case, accept the proposed solution of the environmental concerns.

The Board has before it exhibits additional to the ones adduced at the previous hearing. Important Exhibits are L-42, the lagoon plan, L-44 the C.B.C.L. proposal (one page), L-45, a letter dated October 5, 1988, directed from the Honourable David Nantes to Mayor Ron Lane. Exhibit L-46 a later letter dated October 31, 1988, from Mr. DiPersio's office to the Board (enclosing a copy of a resolution of the Town Council and a schedule for planning changes) concludes the important exhibits.

The Board, seeing these, must decide whether the Town has met provisions 4, 5 and 6 of its order.

Nothing before the Board shows there is any direct federal support for the cure of the Town's sewer and water problems.

The Board finds that the Town, with all due haste, entered into negotiations with, at least, the Province. The Town attempted to conclude a satisfactory agreement with the Province "to help ensure the Town will be able to complete its "10-year plan" of water and sewer improvement". The thrust of Mr. Nixon's evidence confirms this. The documents adduced confirm this. Thus the Board finds the Town has entered into negotiations as requested by the order of March 22, 1988.

The Town has made this application. Therefore the Board must assume the Town has completed the negotiations under provision 4 and 5 to its satisfaction. The Town has then fulfilled its duty under provision 5 of the Order to bring this matter before the Board.

The Board still has a duty under provision 5 to "ascertain whether the results of the negotiations conformed with the condition for completion of the Town's 10-year plan previously alluded to...".

The real crunch, then, is whether the Board believes the Town has done its best to control its environmental problems. Will its best control those problems? Has the Town ensured that this annexation will not unduly affect and exacerbate the Town's environmental problems?

The Town presently has problems caused by improper water supplies and inadequate sewage disposal. The Board, in its previous decision, found there was a problem requiring a 10-year expensive solution, straining Town resources. The Board felt that no annexation should proceed until Town and Province committed resources adequate to allow the annexation without exacerbating the environmental damage.

The Board finds that the Town acted strongly to obtain the most possible provincial support.

Provincial support, so arrived at, is evidenced in different ways.

Provincial realization (as well as the Town's realization) of the water and sewer problems in the Town has crystalized. This annexation application focused the attention of responsible authorities on the existing problems in Liverpool in matters of water and sewer.

The Province has given concrete help in many ways: It has provided money for studies. It has co-funded some phased construction. The Town has appropriately matched those efforts to the extent of its ability. Governments have actually spent money on the various studies.

The Province has co-operated in setting up an operational scrutiny committee containing persons whose competence appeals to Town and province. These people are overseeing the entire problem and will continue to monitor it. The Board believes this committee will continue to monitor the problems as they appear.

The most important provincial input is the letter from the Honourable David Nantes dated October 5, 1988, Exhibit L-45 before the Board.

The Board will set out the text of that letter in full:

> "Dear Mayor Lane:
>
> I an writing concerning the Town's sewer and water servicing situation.
>
> We are familiar with and endorse in principle the conceptual ten year water and sewer infrastructure upgrading plans recently adopted by Town Council. We understand that detailed engineering investigations are presently being carried out in an effort to further refine these conceptual plans. We commend the Town for their systematic long range infrastructure planning, particularly in the area of pollution abatement.
>
> We strongly support the Town in their efforts to resolve a number of outstanding sewage disposal and water supply problems. Our recent offer to share in

the cost of the Henry Hensey Drive to Waterloo Street trunk sewer project is tangible evidence of this support. Although we are unable to make a long term, dollar specific funding commitment to infrastructure upgrading within the Town, I can assure you that our financial participation will not end here.

We would invite the Town to submit applications for funding assistance on a project-by-project basis, as implementation of the 10-year infrastructure upgrading plans progresses. As circumstances permit, the Provincial Government will respond to the needs identified on a priority basis, as we have in the past.

I would like to note, however, that the Province, in evaluating future capital funding assistance requests, will be placing increasing emphasis on pollution abatement. You may recall that, in my recent speech to the Union of Nova Scotia Municipalities, I emphasized the need for improved sewage treatment performance in the Province, as well as a full partnership of governments and industry to tackle this problem. As you go about establishing future infrastructure upgrading plans, I would encourage you to place high priority on sewage treatment.

Yours very truly,

(sgd.)
David Nantes
Minister Responsible for
the Department of
Municipal Affairs."

The Board feels, from the evidence of Mayor Lane and Mr. Nixon, that this is the best provincial commitment the Town will receive. The plan sets the goal of funding the lagoon plan or future derivitives of it.

As noted by Ms. Crawford, the Board must decide whether this commitment meets the criteria set in its March Order.

The Board accepts Exhibit L-45 as a strong provincial endorsement of the Town's policy concerning the Town's sewer and water problems.

If Minister Nantes' statement in that letter "...Although we are unable to make a long-term dollar specific funding commitment..." was intended to mean "unable" as a matter of law, the Board refuses to accept that statement of law as correct. If the Minister's statement was intended to be a fiscal or other policy statement, then the Board has no other function but to accept it at its face value and make its decision based on that acceptance. The Board assumes the statement was made other than as a statement of law.

The Board accepts that it is uncoventional and unusual for governments to make long-term commitments such as Liverpool requests.

The municipal government is in an extremely difficult position. Given that a municipality must cure its sewage disposal problems by making a long-term commitment, should it receive a concomitant provincial commitment? A municipal government can find not much use out of half a sewer or a quarter of a water system. Municipalities ordinarily phase construction of such services but they must plan, and to a large extent finance, them as a whole.

Philosophically this conflict of necessary goals and fiscal commitments less than the total required for those goals raises interesting questions outside the Board's power to consider. The levels of government concerned have the powers and, with respect, the need to address, with modern concepts, the resolution of such conflict.

Minister Nantes' letter shows a high level of co-operation from the provincial government. The Board believes that there is a will in the government to see Liverpool through its problems within bounds of commitment. Again, the Board reiterates the smallness of this application in relation to the municipality. It notes the smallness of the application in relation to the Town (in proportion, at least, to its general area). The Board considers the smallness of the funds committed in relation to the resources still available to the Province. In this application, because of this smallness, the Board will accept this conventional commitment of the province as the best the Town can obtain. The Board finds the "commitment" by the province adequate to meet the provisions of its order of March 22nd.

The Board then refers to the portion of Exhibit L-46 which deals with the Town's commitment to forwarding its study. That is the resolution part of Exhibit L-46 and the Board will quote the resolution in full:

> "WHEREAS the previous Council of the Town of Liverpool had caused to be initiated an annexation application respecting the annexation of certain lands on the Town of Liverpool's southwesterly boundary; and
>
> WHEREAS we, as the newly elected Council of the Town of Liverpool have now been made aware of the details of said application including the details of an order granted by the Municipal Board on the 22nd day of March, 1988; and
>
> WHEREAS we are further aware of events which transpired at a further hearing of the Municipal Board held on the 12th day of October, 1988 with respect to the aforementioned annexation application;

> NOW THEREFORE BE IT RESOLVED that the Town Council of the Town of Liverpool does hereby give its full consent, approval and endorsement to the present annexation application;
>
> AND BE IT FURTHER RESOLVED that the Town Council of the Town of Liverpool do further hereby commit ourselves and this Council to the implementation and completion of the long term water and sewer plans previously presented to the Municipal Board and more recently elaborated upon in a study carried out by Canadian British Consultant Limited, which study is dated the 19th day of October, 1988.
>
> AND BE IT FURTHER RESOLVED that the implementation and completion of these long term plans shall be considered and treated as a top priority item by this Council."

Two Councils of the Town in succession have committed themselves to this annexation and to the infrastructure requirements it has. The Board agrees with the actions of the Town to date. The Board believes that the Town has satisfied the burden of proving that it will proceed with these long-term plans.

The Board also agrees with the provisions made by the Province to support this project. Without such support, the Town might not have the strength necessary for the successful completion of the Plan. The Board therefore finds the Applicant has satisfied provisions 4, 5 and 6, (the nub of this application) of the previous order. The Board will order annexation to take place as of the date of the present Order.

Provision 7 of the March Order has no further application.

The Municipality will have no further duty under provision 8 of the Order of March 22nd.

As of the date of annexation, the Municipal Development Officer of the Municipality will have no further duties under the March 22nd Order.

On the completion of the annexation, provision 10 will have no further effect for government officials employed by the Municipality. Other governmental officials may still have to have concern under provision 7 of the March 22nd Order until the Town's development legislation can bind the land.

Provision 11 of the Order of March 22nd thus becomes obsolete upon annexation as well.

Provision number 12 now becomes operative on the date that this area is annexed to the Town.

Mr. DiPersio, in Exhibit 2-46, gave a tentative time scale for Town imposition of planning controls prepared by the Planner. This schedule shows the timing of the necessary changes for the M.P.S. and the Land-Use By-law completed on or about May 3, 1989. The Board knew that some time delay would occur. It appreciates Mr. DiPersio's clear time schedule which is a legislative goal that the Town will attempt to meet. The Board feels that this schedule allows a reasonable time for the annexed property to exist without developmental controls other than this Order. Therefore the Board proposes to continue the provisions of Section 12 in force as it stands until the Town imposes its M.P.S., L.U.B. and Building By-law on the annexed area.

Provision 13 of the previous Order will prevail in a like manner.

Provision 14 of the provisional Order will prevail in a like manner.

Provision 15 is a type of provision that must continue at least until other developmental controls are in effect. Unless the Board misdraws the order that emanates from this decision, the parties probably will not make other references to the Board. The Board, however, wishes to leave that option open.

These provisions of development control ("freeze") are in the Board's view absolutely necessary. Otherwise there could be a hiatus when there are no planning controls governing the annexed land. Anybody might build anything they liked in this 30 acres during such hiatus. The Board feels that is a real risk. The Board feels that it has an incidental power under this type of annexation to prevent such a risk. Nobody has argued in the hearing that such Board action would be unfair either to the landowners or to either municipality.

Counsel and the Board agreed that if an annexation were granted the most nearly permanent storage of boundary records would be in the Registry of Deeds in Liverpool. The Board will order that the Town register a certain plan of the annexed area in the Registry of Deeds. The Board will order that the Town also register a certain description of the annexed area. The Order granted should become an Order of the Supreme Court under the Provisions of the **Municipal Board Act**. The Board believes it to be of benefit that these records be preserved as long as possible.

On March 22, 1988, the Board defined the area to be annexed . It defined the conditions of the annexation on this application. The Town has met those conditions. The Board has:

1. accepted the annexation;

2. acceded the request of all counsel that there be no order as to costs;

3. that the development freeze in the annexed area be continued until the Town can zone the area.

For assessment purposes, which are not very important in this case since the land has a very low assessed value, the Board adopts the words of the Town of New Waterford Annexation NSMB-17-86-MB (unreported) at page 77 of the filed decision:

> "For the purpose of completing the assessment roll as required by Section 64 of the Assessment Act, R.S.N.S., 1967, C. 14...the annexation will be effective December 1, 1987."

and will make this annexation effective for assessment purposes December 1, 1988.

For all other purposes the annexation will be effective as of the date of the Order flowing from this decision. There is no point delaying it to another date.

The Board thanks all counsel involved for their assistance in what was, to this particular Board, the consideration of a novel application.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 21st day of November, A.D., 1988.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Municipal Boundaries and Representation Act, S.N.S., 1982, Chapter 10;

- and -

IN THE MATTER OF: An application by the **TOWN OF LIVERPOOL** to annex an area of approximately 45.34 acres adjoining the southern boundary of the Town and presently within the **MUNICIPALITY OF THE COUNTY OF QUEENS.**

BEFORE: RICHARD L. WELDON, Member

COUNSEL: JAMES P.DIPERSIO, LL.B. on behalf of the Applicant, the Town of Liverpool

GERALD B. FREEMAN, Q.C. on behalf of the Municipality of the County of Queens

DECISION

Pursuant to Section 16(1) of **CHAPTER 9, S.N.S. 1981, THE MUNICIPAL BOARD ACT,** THE CHAIRMAN assigned Board member Richard L. Weldon to hear this application for annexation at the Board's April 13, 1987 sittings at the East Room of the Town Hall, Liverpool subsequent to which a preliminary order was issued setting 10.00 a.m. June 25 1987 " East Room ", Town Hall, Liverpool as the time date and place for the commencement of the public hearing for the application for annexation herein.

At that time and place the Board convened and granted an adjournment, at the request of the Town of Liverpool (hereinafter called the Town) and with the consent of the Municipality of the County of Queens (hereinafter called the Municipality), set the hearing to reconvene at the Town Council Chambers of the Town at 10.00 A.M. October 14, 1987. At the adjournment a specific hearing time of 7.00 p.m. of October 14, 1987 was set to accommodate such members of the public who might wish to testify before the Board after regular working hours.

After due notice this application for annexation was heard by the Board at the Council Chambers, Town Hall,Liverpool October 14 and 15, 1987.

The initial application by the Town to annex an area of approximately 45.34 acres adjoining the southern boundary of the Town, presently within the Municipality was dated October 1, 1986 and received by the Board October 6, 1986. On October 23, 1986 the Board by letter to the Town's mayor R.L. Lane requested the Town to resubmit or refile the Town's application. The Town resubmitted its application by letter of October 27, 1986 which was received by the Board on October 30, 1986.

At the hearing for the preliminary order mentioned above, the Municipality became the only other active party to the application. At this hearing the Board determined that the Application made pursuant to Section 20 of Municipal Boundaries and Representation Act, S.N.S. 1982, Chapter 10 was an application for a preliminary order as set out in Sections 7-11 of the Act.

The preliminary order previously adverted to contained the following provisions:

"**IT IS HEREBY ORDERED ...**

1. That the suggested boundaries of the area proposed to be annexed be those described in the application as Exhibit L-2'.

2. That a comprehensive study be undertaken by the Applicant:

a) to examine the necessity or expediency of the proposed annexation;

b) to examine the financial position and obligation of the Town and the burden of taxation on the ratepayers;

c) to examine the financial and social implications of the proposed annexation for the area proposed to be annexed;

d) to examine the financial implications of the proposed annexation on the Town, the Municipality of Queens (sic) and the Province, and notwithstanding the generality of the foregoing;

e) to examine any particular implications of the proposed annexation to the Province arising from a proposal to locate a school within the area to be annexed;

f) to examine any particular financial implications to the Province of the proposed annexation arising from the installation of sewer and water services within the area to be annexed;

3. That a study be undertaken by the Municipality of the County of Queens to examine the financial and other implications to the Municipality of the proposed annexation including the financial impact on its ratepayers.

4. That a study be undertaken by the Queens District School Board to examine any particular financial implications of the proposed annexation to the Province and to the Queens District School Board arising from a proposal to locate a school within the area to be annexed.

5. That the Minister of Education, or his nominee, be entitled and encouraged to present evidence concerning any particular financial implications of the proposed annexation to the Province arising from a proposal to locate a school within the area to be annexed.

6. That the Minister of the Environment, or his nominee, be entitled and encouraged to present evidence concerning any particular financial implications of the proposed annexation to the Province arising from a proposal to install sewer and water services within the area proposed to be annexed.

7. That the Applicant cause to be delivered as soon as may be (and in any event not later than May 8, 1987) a copy of this order to:

(i) the Minister of Education;
(ii) the Minister of the Environment;
(iii) the Queens District School Board;
(iv) the Municipality of the County of Queens.

8. That the specified studies be filed with the Board on or before June 15, 1987, and exchanged directly between those charged with the undertaking of such studies on or before the same date."

...

The application by the Town (Exhibit L-1) was accompanied by a Resolution signed by the Mayor and the Town Clerk passed at a special meeting of the Town Council on August 20, 1986. This application contained a metes and bounds description of the land to be annexed in a Schedule "A".

The application contained the following text:

"1. The Town of Liverpool is a body corporate under the Provisions of the Town's Act.
2. The Council of the Town of Liverpool, hereinafter referred to as the "Applicant", did at a Special Meeting of the Council held at 6:30 p.m., August 20, 1986, unanimously resolve to enter an application with the Nova Scotia Municipal Board to annex approximately 45.34 acres, more or less, of land lying and being situated within the Municipality of Queens County, in the Province of Nova Scotia. A copy of the resolution is annexed as Exhibit L-1.
3. The applicant now seeks a preliminary order in relation to this land. The area of land is more particularly described in Schedule "A"(metes and bounds with reference to a plan of survey) annexed as Exhibits L-2 and L-3 respectively.
4. The area of land sought to be annexed is unpopulated; the greater part being owned by Nauss Brothers Limited, Bridgewater, and smaller areas by the following residents of the Town of Liverpool, whose lots extend into the Municipality of Queens(sic):

Gerald A. Chute
Victor A. Kempton
Charles MacKay
Robert Ritcey
Clifford Sandford

5. The assessed value of the land sought to be annexed is $25,800.00 and the tax income derived by the Municipality of Queens(sic) $210.68 annually. "

...

In this application no grounds for the proposed annexation were stated. Any grounds for the application may be found in the Town of Liverpool Annexation Study (Exhibit L-6) at p13 and ff:

" 4. THE NECESSITY AND EXPEDIENCY OF ANNEXATION

(1) It is a necessity for the Town... to secure and service land suitable for residential development as required by the current demand...The town has a responsibility to both maintain the status of its existing residents and to provide reasonable opportunity for the accommodation of other possible residents.
(2) It is far more expedient for a private developer...to service the area in question if it were in the town than it would be for the county of Queens(sic) to service the area...the only possible way that area could be serviced within the County would be the installation of private sewer systems and water supplies which would severely limit the potential for development in the area. ...
(3) The fact that a private developer is undertaking the project is very expedient in itself in that it allows the land to be serviced and developed at a much lower cost than would be incurred if the Town were to have the work done... . The proposed development is consistent with the existing development in the Cobbs Ridge area.
(4) The Town... is ...concerned about the possible future problems associated with the development of the area as a rural municipality....
...
(6) The location of the proposed development with respect to its proximity to other residential development and the ease of access to the amenities such as recreational, educational, and cultural suggests that the area be developed in a similar urban fashion. Rural development in this area would simply not be compatible with the surrounding neighbouhood....
(7) ... the Town does require more land for residential purposes...[and] is unable... to assemble and service the existing undeveloped lands within the Town to provide for residential development. The development of the proposed area by a private developer is therefore both necessary and expedient."

In addition to the witnesses (2) he called at the earlier Board hearing in order to obtain the preliminary order herein, counsel for the Town called 7 witnesses. Counsel for the Municipality called 1 witness.

At the time of the filing of the application for annexation with the Board and at the time of the granting of the preliminary order by the Board, the Minister of Municipal Affairs was a party to the application by virtue of Section 27(1)(d) of the Municipal Board Act S.N.S., 1981, Chapter 9 [as it then stood], and was notified of the commencement of the proceedings and of all subsequent hearings in the proceedings but did not appear or participate in the hearing. The Minister of Education and the Minister of the Environment were both "entitled and encouraged" by the preliminary order to particiate in the proceedings and did not do so. The Queens District School Board was ordered (a) to undertake a study;

(b) exchange that study with others charged with the undertaking of such studies on or before June 15, 1987;

(c) file its study with the Board on or before the same date.

To the date of this decision the Queens District School Board has not complied with any of the provisions of the preliminary order. The Queens District School Board did not participate at the hearing of this application.(See, however, Exhibit L-20 set out elsewhere in this decision.)

Counsel for the Applicant and counsel for the Municipality submitted an "Agreement of Counsel' (Exhibit L-27) with the view of expediting the proceedings therewith.

Robert L. Hunt, a Nova Scotia Land Surveyor, who has worked primarily in the South Shore area was accepted as a qualified land surveyor entitled to give expert opinion evidence in that field. He gave evidence on the plan showing lands proposed for annexation (Exhibit L-5). He prepared the description of lands accompanying the application for annexation (Exhibit L-1) and the corrected or revised land description describing the lands to be annexed (Exhibit L-28). Mr. Hunt stated that he had walked over certain parts of the subject lands. He outlined the principal features of the subject lands and the ownerships at the time of the application to the Board and the ownerships at the present.

Mr. Hunt had drawn up a proposal for the use of the subject lands that is graphically shown on a plan (diagram) Exhibit L-29. He worked under instructions of Nauss Brothers Limited the now or former owner of most of the 40 odd acres of subject lands. Exhibit L-29 shows the ownerships of various other private owners (some 5 private individual owners of 5 small several portions of land) of lands to the north corner of the subject lands which intrude over the Town boundary into the proposed annexed area of the Municipality and which are the rear portions of their residential lots, the residences on which front on and are serviced over an existing Town street. Southeasterly of the rear portions of these individually owned residential lots is the 10 odd acre lot which has now apparently been conveyed by Nauss Brothers Limited to the Department of Public Works for use as a school site by the Queens District School Board courtesy of the Department of Education. On Exhibit L-29 Mr. Hunt had designed a tenative subdivision for maximum single family residential use of all the lands proposed to be annexed with the necessary street layouts, access connections to the school site and eventual street access to the surrounding Municipality. On two of the

" three " sides not abutting the Town, the subject lands abut the territory of the Municipality. On the third side the school site essentially occupies the entire common boundary with the Municipality. Mr. Hunt says that the Municipality and the relevant school authorities have arranged for street access to the school site from the Municipality. Exhibit L-29 does not show this particular access. Mr. Hunt says his subdivision plan of the subject lands allows a maximum of 150 single family lots. In doing so it utilizes some small portions of land owned by Nauss Brothers and already located within the Town.

Mr. Hunt said there were no people living (human inhabitants) in the area to be annexed.

Mr. Hunt said it was his understanding that the school site could be used for school purposes and serviced with on-site sewer and water but that the preference of the persons in authority "in Halifax" with whom he had spoken was to service the school site with central services provided by the Town through its central sewer and water system which was proposed to be made available to the south westerly boundary of the school site following upon the installation of those services in the proposed street shown on Exhibit L-29.

Mr. Hunt said that the accurate acreage for the school site was 10.83 acres.

James William Thorburn, having already testified at the Board hearing which led to the preliminary order herein, was qualified as an environmental engineer planner and gave the Board expert opinion evidence in that field concerning the present application for annexation.

Mr. Thorburn was the author of the "Town of Liverpool Annexation Study" (supra), the " Supplement to the Liverpool Annexation Study" (Exhibit L-7), and the "Addendum to the Annexation Study" (Exhibit L-22).

Mr. Thorburn said that he prepared the "Town of Liverpool Annexation Study" to outline whether there was a neccessity or expediency or both for the annexation of the "outset area." He worked on retainer from the Town to prepare the study. In preparation for the study, he researched by reading various cases concerning annexation in Nova Scotia and by reading the Municipal Boundaries and Representation Act.

Mr. Thorburn noted several trends in his report the "Town of Liverpool Annexation Study". He said the average number of persons per household (in common with the rest of the Province) in the Town was declining. In 1976 the average number of persons per household in the Town was 3.1. In 1981 in the Town it was 2.8.

Mr. Thorburn noted that the building permits for single family and duplex dwelling units in the Town (1977-1986) were issued as shown by this excerpt for Exhibit L-6, the "Town of Liverpool Annexation Study" :

"TABLE II
Building permits for Single Family and Duplex Dwellings
1977-1986

1977	1978	1979	1980	1981	1982	1983	1984	1985	1986
11	9	8	4	14	6	1	20	1	1

"

He said the peaks in the granting of residential building permits coincided with the availability in the Town of serviced blocks of residential subdivision lots for building. He said the 1981 peak occurred when the Cobb's Ridge development scheme was brought on stream and the 1984 peak occurred when the Privateers Co-op development matured. In each case the rush [for Liverpool] of residential development followed upon the provision of a subdivision of approved vacant building lots. Mr. Thorburn contended that the almost total absence of new residential development represented by the paucity of granted building permits in 1983, 1985, and 1986 (and he believes in 1987 to date) does not represent a lack of demand for such housing in the Town. Mr. Thorburn advances the opposite thesis that when serviced vacant subdivision lots are available in the Town in suitable locations their availability will encourage increased development and building activity within the Town.

Mr. Thorburn used an environmental constraint map, part of Exhibit L-6, to illustrate the lack of vacant land in the Town suitable for residential subdivision developments. He identified 5 several areas of vacant land which are found within the Town's existing boundaries. Site 1 marked on that map is 40 acres in size but is unsuitable for present economic development according to Mr. Thorburn because it has too much bedrock, has multiple internal ownerships (which make private land assembly difficult) and some locational difficulties. The other 4 sites, according to Mr. Thorburn, have one or more of the above difficulties which make development of those sites uneconomic for residential subdivision use. The cost of development on each of these sites would be so high that the sale price of the finished product lot would be above the market price which such approved lots would currently fetch in the Town. In short, according to Mr. Thorburn, none of the vacant land already in the Town is suitable for economic development as approved residential serviced subdivision lots.

Mr Thorburn says that the location of the subject land (adjacent to the most recent residential subdivision development in the Town and a natural extension thereof), the topography of the land itself, the sole ownership of the land to be subdivided for residential purposes, the serviceabilty of the subject land with Town piped services all combine to overcome any deficiencies in the land (e.g. its location on a high point) and to demonstrate that this is the best land available for the necessary residential development of the Town.

Mr. Thorburn says the willingness of the landowning developer to develop this land is, for Liverpool, a very strong " plus " for the Town's efforts to promote its own growth.

Mr. Thorburn notes in his report that the annexation of the subject land would provide the Town with all the land it needs for residential development for some time to come. Mr. Thorburn holds the opinion that the subject lands would be more easily and more cheaply serviced through the Town's piped services. He knows of no plans of the Municipality to service the subject lands with central sewer and water services.

Mr. Thorburn says the Municipality has no subdivision by-law (the Town does) and if this land were developed within the Municipality, the Municipality would be less able than the Town to control the quality of life in any residential development placed on the subject lands.

Cobbs Ridge Development and the Privateers Co-op Development are in the same area of the Town. The subject lands are adjacent thereto. Mr. Thorburn is of the opinion that those areas of Town are the areas of Town in which people wish to build new single family houses and the subject property other than the school portion thereof is the natural extension of those areas. The subject land's proposed use as a residential subdivision would be compatible with any present development on adjacent lands. Mr. Thorburn feels the 150 residential lots made available by this proposed development would encourage and then meet a demand for such lots in the Town for some 10-15 years.

According to Mr. Thorburn, no people (human inhabitants) live within the area to be annexed. No social implications flow from this annexation which would impact on the area to be annexed since there are no such inhabitants.

Mr. Thorburn acknowledged there are sore points between the Town and the Municipality left over as part of the legacy of prior and much more ambitious attempts of the Town to annex portions of the Municipalty's territory. Mr. Thorburn said that this residual sensitivity to the annexation issue on the part of the Municipality was addressed by the Town in the formation of its present proposal to annex a portion of the Municipality. He said that the Town had been careful not to ask for any more land than it really needed, that the Town had kept the Municipality fully informed as to the content and the progress of the Town's efforts leading to the present application, and that the Town had made a sincere effort to obtain the Municipality's consent to the proposed annexation.

Mr. Thorburn said he had made inquiries and as a result of those inquiries he felt that the Town's fire fighting services, police services, and school services would be able to accommodate the proposed development. He felt the extra students which the proposed development would place in the local school suystem would help to bring up the shrunken enrollment in that system and help to allow that system to make better use of its existing facilities and to obtain higher funding which could be used to upgrade the level of education provided by the school system.

Mr. Thorburn admitted there was some question whether the existing Town facilities could adequately handle the proper disposal of the additional sanitary and storm sewage which would be generated by the proposed development. Some question also arose as to the Town's ability to deliver piped water to the proposed development. Mr. Thorburn did not want to " get into the exact technical things " but he informed himself of the Town's " 10 year plan " to provide itself with a general upgrading of its water, sewer, and sewage treatment services. Mr. Thorburn felt that if this " 10 year plan " were put into effect the Town would be well on its way to correct any existing problems in these services and would be able to service the proposed development as it progressed in its phased development.

Mr. Thorburn feels the Town will execute its " 10 year plan " whether or not this annexation application succeeds. He feels that the new Regional High School proposed for the school area of the subject land will be built and used regardless of the success or failure of the present annexation application.

Mr. Thorburn holds the opinion that the singularity of ownership of the subject lands, the ease of servicing the same, the need for the Town to encourage residential development, all combine to show there is both a "clear necessity and a clear expediency " for the Town to annex the subject lands at the present time.

On cross-examination, Mr. Thorburn testified that the Town had sufficent land for any anticipated industrial development. He felt there was available land for commercial development. Since the proposed annexation would provide the Town's needs for land for residential development for some 10-15 years and since it needed no more land for industrial or commercial development, Mr Thorburn could see no need for the Town to annex more land (other than that presently proposed) from the Municipality once the present annexation succeeds.

Mr. Thorburn felt that the Meadow Ponds watershed would never be and has never been contemplated as a source of potable water supply for any municipality let alone the Town. That portion of the proposed development that would discharge its surface drainage into the adjacent Meadow Pond watershed would therefore not contaminate any supply of potable water needed for municipal purposes. On the other hand the surface drainage from the proposed development onto the Meadow Pond watershed need not be diverted and thus the water supply for that watershed should not be unduly diminished by the drainage patterns to be established by the proposed development.

In residential development of the subject lands under the existing regulations of the Municipality, Mr. Thorburn said that the development would be much less dense since the streets would be wider (66' rather than 50') and the individual lots would have to be much larger to accommodate the regulations which prevail when residential development occurred in the Municipality with on-site water and sewer services.

Mr. Thorburn estimated that the present day cost of development of the proposed subdivision would be about $230.00 a front foot.

Mr. Thorburn does not believe that the loss of the subject land from the Municipality will be " a great loss to the County of Queens."

Mr. Thorburn holds the opinion that the legal tests prescribed in the Municipal Boundaries and Representation Act for the Board, in considering an annexation application, requiring the Board to have regard for the wishes of the "inhabitants of the area" in this particular case have little meaning since the area to be dealt with is the area to be annexed only and that area is uninhabited.

Under questions from the Board, Mr. Thorburn said that he regarded the installation of piped services to the subject lands as an engineering problem only, an installation which could proceed regardless of whether or not the present annexation application succeeded. By accommodation between the two adjacent civic governments the land could be developed and serviced as proposed. Mr. Thorburn felt that such political accommodation to support the engineering development was unlikely since " the Town of Liverpool will not-has a general rule- will not service land that is not within their jurisdiction and I think that is mentioned in their Municipal Development Plan. ...They don't extend their services outside their present boundary."

Mr. Thorburn concedes that under current demands the Town's system for disposal of combined sanitary and storm sewage through a primary treatment plant overloads on occasion and that the addition of the annexed area consisting of a large school (approximately 10 acres) plus 160 houses on the rest of the annexed area will exacerbate the present overload on the Town's sewage disposal system.

Mr. Kenneth Smith, Development Officer/By-law Enforcement Officer for the Town gave evidence next. He obtained consents to this annexation application from 4 of the 5 individual home owners directly affected by this annexation application since their residential lots are partly located in the Town and partly located in the area of the Municipality proposed to be annexed. He was aware that the 5th owner's consent to this annexation was obtained by someone else. Mr. Smith was of the opinion that one of the inhabited dwellings was located partly in the Town and partly in the Municipality. [For its purposes the Board will construe this tidbit of information as interesting but inconsequential in the result.]

Mr. Smith had worked out traffic demands which would be caused by the proposed development and said he was of the opinion that the existing Town streets could accommodate any increased traffic which might be generated by the development.

Mr. Smith noted that the Town had recently passed a new subdivision by-law and that subdivision by-law would apply, in the opinion of Mr. Smith, to the subject area immediately upon annexation. Under that by-law the costs of all piped services within a new subdivision, such as is proposed here, would be borne by the developer in the first instance and would be installed at no cost to the Town. Mr. Smith believed the proposed subdivision encompassed 115 residential building lots for single family homes.

Clarence Nauss, Secretary/Treasurer of Nauss Brothers Limited the owner of most of the land to be annexed, gave evidence next. As the preeminent landowner and developer of the land proposed to be annexed, Mr.Nauss said his company supported the Town's application to annex the portion of the Municipality sought in this application.

Mr. Nauss said his company was a successful developer on the province's South Shore and had developed, to the satisfaction of all concerned, the adjacent Cobb's Ridge subdivision in the Town. He said his company proposed to develop the presently considered lands in the same type of development which had proven popular on Cobb's Ridge. Mr. Nauss said Cobb's Ridge was a 100 lot development and it took his company about 14 years to develop and market the lots in that subdivision. He said that subdivision was now full.

Mr. Nauss said his company would not proceed with the development of the residue (after the school site sale is deducted from the total landholding) of their land unless the residue is annexed as is now proposed. No development has occurred on the site to the present under the existing conditions because Mr. Nauss' company does not think it viable for them to develop their lands in the Municipality " without the proper services ....We have no plans if it is not annexed."

Mr. Nauss says that if the annexation application succeeds his company will proceed to develop the residential portion of the subject land as planned in several distinct phases as economic demands warrant. He feels that it will take 10 years to complete construction of the proposed subdivision which encompasses the entire development not included in the school property.

Mr. Nauss holds the opinion that there is an unmet demand in the Town for the type of residential development he is proposing for the subject land and he is prepared to back that judgement with his company's investment in the present project. Mr. Nauss feels that delay in execution of the plan of subdividing will increase the overall cost of the development: He feels as well that such cost of delay can be met by increase of the sale price of the individual lots. Thus delay in development will not likely be fatal to the economic development of the subject property as a residential addition to the Cobb's Ridge development.

Mr. Nauss believes that his company can economically market lots in this proposed subdivision between $10,000.00 to $15,000.00 per lot.

Mr. Nauss confirmed that the provincial Department of Government Services had already completed the purchase from his company of the " school lot ".

Mr. Nauss estimated that his company would have 100 residential single family lots to market in the area of the proposed annexation.

Mr. Nauss said he thought the school project on the " school lot " would be developed with on-site sewer and water services.

In regard to street connections with existing Town streets, Mr. Nauss said his company would have to pay for and develop certain portions of the street reserve between the area proposed to be annexed and the existing dedicated Town streets, Crowell and Barss.

The next witness Terrance J. Simms, P.E., was qualified to give opinion evidence concerning the sewer and water services of the Town and their suitability to support the present demand put on them by the inhabitants of the Town and their ability to sustain the extra load such services might encounter when the developments proposed for the annexation area were to come on stream.

Mr. Simms has been an engineering consultant for the Town since 1982. He is the author of " a ten year sewer plan...which has been adopted by the Town of Liverpool."

Mr. Simms said about the sewer systems of Liverpool:

> "...it was ackowledged...that the Town could receive sewage from the developments in the fact that the sewer on Barss Street and Crowell Street was of suffcent size, however, as far as treatment goes...the Town really could not accept the sewage because of the constraints placed on it by the Department of Environment. Since then, the Town by motion of Council adopted a 10-year pollution control program-a water pollution control program which has committed its [sic] the Town to upgrading its sewage treatment facilities and they

have received correspondence from the Department of the Environment which has said in effect that provided you stay with this 10-year program ... that you can continue to develop...[this exchange of correspondence between the Department of the Environment and Mr. Simms] in effect allows... the Town... [not to have] to go immediately and fund in a significant cost before any developments can occur really anywhere in the Town or anything more can be done to the way of sewage. It does allow the Town to progress in a normal fashion over the next 10 years while this whole pollution control program is implemented during that period. A program such as this... cannot be implemented overnight."

Mr. Simms holds the opinion that if the Town implements its 10 year program for sewer and water improvments it can deal with all the sewage from the two developments i.e. the proposed school and the proposed residential subdivision both located in the area proposed to be annexed.

Mr. Simms has some concern left that the disposal of drainage [the Board assumes he means surface drainage] from the annexation site has not yet been addressed by the present plans. If the drainage from the annexed site is to be routed through Town combined sewers, then the sewers in Crowell and Barss Streets will have to increased in size. The " 10 year plan " alluded to by Mr. Simms does not include increasing the size of those sewers.

During a water shortage crisis in the Town in the summers of 1984 and 1985, Mr Simms said the Town had studied the feasibility of using the Meadow Pond watershed as a suitable source of supply for potable water for the Town but for physical reasons the use of the Meadow Pond was rejected and the Mersey River was identified as the most suitable source of water for the present, and for the forseeable future, for the Town.

On cross-examination, Mr. Simms stated that in the Mersey River source the Town had available a source of supply of water twice the size of the present water consumption of the Town. The water shortage problems of the Town indicated by the Town's water shortages of 1984 and 1985 have been cured by increasing the size of the watershed servicing the Town's supply and by increasing the storage capacity of the Town's water storage capabilities. The " 10 year water plan " discussed by Mr. Simms is basically a plan to upgrade the distribution system of the Town's enhanced water supply after first studying the existing system to determine the nature and extent of the upgrading required.

What this means to the present proposed development, according to Mr. Simms, is that the present annexation area could be serviced with a domestic water supply by a simple extension of the existing water mains but that water supply to the annexation area would be inadequate for fire protection purposes until the goals of the " 10 year water improvement plan " are met. Mr. Simms believes that the fire protection needs of the annexation area can be met by the installation of a 250,000 gallon above ground resevoir tank in close proximity to the proposed development. Mr. Simms felt that the same objective could be met by increasing the size of the cross-town main to service the annexation site.

Mr. Simms believes that the proposed school will draw its water by extensions from the existing mains on Barss Street and will build up its fire protection pressures by pumps internal and peculiar to the school building so that the school will have enhanced fire fighting capabilities whether or not the planned upgrading of the Town's water delivery system occurs.

Mr. Simms says there is no intention to try to separate the present combined storm and sanitary sewage in the Town "It is just too expensive." Any storm drainage from any new development will be kept separate from the sanitary sewage of that development. The sanitary sewage of any new development will be streamed through the planned sewage treatment system of the Town. Under the " 10 year sewage disposal plan " the Town is committed to picking up all the presently untreated or undertreated sewage generated in the Town. As part of that pickup, says Mr. Simms, the sewer problem of the annexation area would be cured as a minor addendum to the larger scheme-" the impact of annexation is peanuts."

Mr. Simms seems to contradict his previous testimony when he notes that the separate storm sewer system to lead out of the annexed area will, somewhere downstream, be joined to the Town's combined sewer system and then routed through the treatment plant. Nothing in this decision appears to hang on this apparent inconsistency.

Mr. Simms says the " 10 year sewer plan " contemplates a $4,600,000.00 expenditure over the 10 year period and the " 10 year water plan " for the Town would cost some $2,500,000.00. Mr. Simms, in expressing these figures, did not give any time factors for the dollars. If it were important to this decision, the Board would assume the figures were expressed in constant 1986 dollars. As the figures were given in " ball park " terms, the Board makes no such finding but takes only the conclusion that the amounts mentioned are considerable and important figures taken in the context of the budget and population of the Town.

Mr. Simms is not aware of any cost-sharing available to the Town from senior levels of government to assist the Town with these anticipated major expenditures. He is further not aware that the Town has committed, on its own or in conjunction with any other government, the funds to support either or both of these major service improvments proposed for the Town.

If the funding were available and if the plans were adopted, Mr. Simms said the sewage treatment plant improvments contemplated to support the annexation could be designed in 1988, construction started in 1989, and completed and on stream in 1991 or 1992.

In reponse to questions on reexamination which concerned the Department of the Environment's interference or input into the present adequacy question concerning the Town's sewer and water services, Mr. Simms had this to say:

> "A. Yes, my understanding of what they have said is that no more development in or out or anywhere around Liverpool unless you commit yourself to implementing a 10-year program.
> Q. But that has to be done before this annexation can go forward or not?
> A. Yes. Otherwise everything stops dead."

Shirley LeMont Nixon, the Town's Clerk and Treasurer, has held those offices since December of 1982. Mr. Nixon says he is fully familiar with the circumstances surrounding the Town's present application for annexation.

Mr. Nixon identified a June 17, 1987 resolution of Town Council (Exhibit L-34) which he said was an adoption in principle of Mr. Simms' pollution control program for the Town. Mr. Nixon said that immediately after Town Council approved that resolution it applied to various provincial departments requesting financial assistance for the work to be carried out under the pollution control program. Municipal Affairs was contacted for funding under the Capital Assistance Program. Government Services was contacted with regard to costs of the provision of water and sewer services. Council has passed a borrowing resolution, for submission to the Minister of Municipal Affairs for his approval, to withdraw or borrow from the special reserve fund a sum not to exceed $70,000.00 for the purpose of " carrying out this work." The Minister has approved this resolution (Exhibit L-35). Exhibit L-36 is an application by the Town for a grant under the capital assistance program, dated July 27,1987, for 50% cost sharing with the Province for a sewer enlargement project, part of the " 10 year pollution control plan, " of some $97,000.00 gross. This application is being held in abeyance for 1987 since all available funds for 1987 are committed. Should some municipality not take up its commitment, the Town's application would be considered for funding out of any residual portion of the province's 1987 capital assistance program. If not , according to Mr. Nixon, the application will remain in force as a request for funding as funding quotas become available in 1988. The Town has asked Municipal Affairs to treat this application as priority for the 1988 funding.

Mr. Nixon said that the Department of Government Services, which is responsible for the placing and construction of the school proposed for the annexed area, has been asked for cost sharing in the installation of water and sewer services designed to help service the annexed area. Mr. Nixon said this department initially expressed a desire to have the school serviced by piped services provided through the extension of the Town facilities. Since the Town has asked for this cost-sharing there has been no formal reply from the Department but Mr. Nixon says that he believes that the Department is at least considering the servicing of the school's water and sewer needs with on-site servicing.

Mr. Nixon was then asked questions concerning the commitment of the Town to the " 10 year pollution control program " and the ability of the Town to meet any commitment:

"Q. Would this particular project,i.e. the 10-year sewer plan be approached in any different manner than any other?
A. No it would not be.
Q. So you are following the same course as you have in the past for other projects?
A. That is correct. If the capital project is of a minor nature, one that the Council themselves in their budget

deliberations feel can be handled by the tax rate then it is included in the capital budget. If it is a project of a major nature such as this one another project we have done during my term as Town Administrator and Town Clerk and Treasurer, we have always submitted an application for funding from provincial agencies whether it be the Department of Municipal Affairs or some other governmental department.
Q. And are you at present exploring all avenues available for cost sharing in this project?
A. Yes we are."

Mr. Nixon said the construction of the school itself would have no direct financial implications for the Town. The cost of construction would be borne by the Department of Government Services and the Town would receive no tax revenue on account of the new building which would be located in the Town if the annexation application succeeded.

Mr. Nixon believed the Town would not need more Council members to represent the population which might come to the annexation area. Town Council now consists of 6 Councillors plus the Mayor-all of whom are elected at large.

Mr. Nixon felt that at the present tax rate and at an average assessment of $60,000.00 per residential unit his estimate of 115 residential units for the annexation area would yield an additional annual tax revenue for the Town of $131,790.00 " or approximately $1,146.00 per unit."

On cross-examination, Mr. Nixon said that the Town's proposal to the Department of Government Services concerning the school construction planned for the annexation area was not dependent in any way on the success or failure of this annexation application.

Mr. Nixon was unable to identify any of the Town costs for snow removal, garbage disposal, policing or fire protection which might be expected to flow from the full development as planned of the annexation area. He noted that there was surplus capacity built into the town's existing fire department and police contracts to service the area with no real increase in cost.

Mr. Nixon had this to say concerning the Town's ability to " go it alone " without provincial help in carrying out the " 10 year pollution control plan ".

"Q. And would there be-the Town is now committed to the 10-year water system and sewage system, the pollution control project, would there be an additional cost to the Town for these services if the annexation goes through-additional costs beyond what has already been-what would be committed-what the Town could be committed for now?
A. No. Because as earlier testified in this hearing, we adopted the 10-year plan because of the fact Environment had told us that we must do certain things before any development can continue anywhere within the Town boundaries, whether we annex or not.
Q. Okay. Now Mr. Nixon as Clerk and Treasurer can you tell us whether ths 10-year plan is realistic given the Town's financial capabilities?
A. Yes. I believe it is if we can get the co-operation of the Provincial Government and get some assistance, If not Council would have to look at borrowing the money and going on a bond issue which is not uncommon for municipal units across the province. Our debt is substantially low for a municipality of our size.
Q. So you have the borrowing capacity to implement this 10-year plan? Even without assistance from the Province?
A. Yes."

The Town seeks 50% Provincial assistance for the capital costs of its " 10-year pollution control plan ". Mr. Nixon does not think that the Province will commit itself to assist the whole " 10-year pollution control plan " in advance. He envisages the Town applying to the province on a year to year basis for provincial funding for the " 10 year plan " .

On questions from the Board, Mr. Nixon felt that Council would be able to carry this " 10-year anti-pollution control plan " into effect even though in that same time period there would be at least 3 municipal general elections in the Town at any one of which the full body of elected Councillors could change. Mr. Nixon felt that because the present Council had adopted the " 10-year plan ", because the plan was essential to any further development within the Town, and because all Councils at least since 1982 have been concerned with the issues which are addressed in the " 10-year pollution control program " for the Town, future Town Councils would continue to carry out the "ten year plan " until it was completed on schedule.

Mr. Dipersio called Deputy-Mayor Robert McConnell a Town Councillor since 1979. He is presently Chairman of the Planning Advisory Committee (PAC) of the Town.

Deputy-Mayor McConnell feels there is a shortage of land in the Town suitable for the development as proposed by Nauss Brothers Limited. He believes Nauss Brothers Limited are good developers, based on their past history of development, and that their proposed development will accelerate the growth in the Town. Annexation is a prequsite for Nauss Brothers Limited to proceed to develop their landholdings in the annexation area.

In his discussion with other persons, Deputy-Mayor McConnell met some who wished to build substantial new homes in the Town and could not find the right type of residential lots on which to build those homes. Deputy-Mayor McConnell felt that the Nauss Brothers subdivision proposal would allow the Town to accommodate the demand for superior house locations within the Town.

Deputy-Mayor McConnell said he and the Mayor went before the full Council of the Municipality in an attempt to allay the Municipality's suspicion (based on a previous and large annexation attempt by the Town) that this relatively minor annexation application was merely " the thin edge of the wedge " of a general attempt by the Town to dismember the Municipality.

Deputy-Mayor McConnell was asked whether or not the Town would provide piped services to the annexation area without first annexing the area. He replied as follows:

> "A. The Council in its wisdom, I believe in 1986, passed a resolution that they no longer would extend the services of water or sewage to those who live outside the boundaries of Liverpool. We had done this in the past for individual homeowners who lived on the Provincial [sic : He must mean municipal] edge of the Town as well as to some institutional uses like the R.C.M.P. The long and the short of it-it stretches our services both water and sewer, we have massive development programs which we have become involved in in both those areas and we came to the conclusion, I believe it was in the winter of 1986, that no longer would we extend that courtesy or service to those who do not live in Liverpool. Unless there were some uncontrolled [unforseen?] circumstance that would surround a particular request."

Deputy-Mayor McConnell felt the joining of the school (to be built on the annexation site) to the Town's piped services might be such a circumstance since the Town's children will be using the new school (as well as students from the Municipality) and since the Town could provide those services at no more cost to the Queens District School Board than the cost of on-site servicing.

Deputy-Mayor McConnell expressed the opinion that unless the Town reversed its present trend to a slowly diminishing population it would soon be a " dead town ". He felt that Town Council was well aware of that fact and were supporting the present annexation as one means to counter that trend. Deputy-Mayor McConnell felt that the proposed annexation was necessary for the continued viability of Liverpool as a town.

Deputy-Mayor McConnell with other civic officials had approached their local M.L.A., the Honourable John Leefe provincial Minister of Fisheries, with a view to modifying the stand of the Department of the Environment which forces the Town to commit itself to control its pollution problems before that Department will permit any further development in the Town. According to Deputy-Mayor McConnell, Mr. Leefe replied: " I won't do that. I fully support the Minister of the Environment and I suggest the Town of Liverpool like the City of Halifax and other municipal units in Nova Scotia and Canada get on with the process of dealing with the pollution problem."

Deputy-Mayor McConnell believes the Town needs growth so that it can gain and hold a professional class, so that it can progress and be more like the Town of Bridgewater and not deteriorate and become more like the Town of Lockeport.

Christopher Jack Leach qualified as an urban planner and was next to give evidence.

Mr. Leach is a liaison planner employed by the Community Planning Division of the Department of Municipal Affairs. As part of his duties, Mr. Leach has been advising the Town on planning matters since February, 1981. Mr. Leach helped in the Town's review of its Municipal Planning Strategy (MPS) and he prepared their recently adopted Land Use By-law (LUB). At present, for the Town, he is conducting a review of the Town's MPS and LUB. He says he is familiar with the present annexation application.

Mr. Leach was asked, in the context of the Municipal Boundaries and Representation Act, to address the necessity and/or expediency of the present application. Mr. Leach believes the Town has a responsibility to make itself a viable municipal unit. It must maintain its " financial " reliability. From a planning point of view, Mr. Leach said the Town could honour that responsibility by providing land for industrial, commercial, and residential development. In Mr. Leach's view, the Town's planning to date has provided adequate land for its industrial and commercial development but has failed to ensure that there is appropriate land made available for residential development.

Mr. Leach confirmed in his stated opinion, after canvassing therein the various areas of undeveloped residential land located within the Town, that he felt the residential component of the annexation area was the most suitable area for the Town to meet its need for serviced residential land.

Mr. Leach seems to feel that the Town has good land use controls over land located within its boundaries through its MPS and LUB, that these lands when annexed will become subject to the controls contained in these documents and that the land -Town developed- will be developed in a superior way under those controls.

Mr. Leach said that there might be a vacuum after any annexation in which the MPS and the LUB of the Town might not apply to the annexation area and the present land use controls found in the Municipality would no longer apply. In effect, and for some indefinite time, there would not be any development controls on the land at all. He suggested that this vacuum would be filled with appropriate R-1 type land use controls as quickly as the Town Council could act.

As its planner, Mr. Leach would recommend that the Town not extend its " hard services " (sewer and water) beyond the Town boundary for hire because once it extended services beyond the political boundary of the Town, the Town would lose a high degree of control over the further extension of such services. Mr. Leach expresssed the opinion that the Town's provision of hard services should be maintained within the Town's political boundaries so that the increased user of the Town's " soft services " (libraries, policing, fire, garbage collection, recreation facilities) by the inhabitants of the newly serviced areas would be Town residents and thus taxable for these soft services. If they were paying users of the hard services-but not town residents- they would have all the benefits of their proximity to the Town's soft services but none of the burdens of supporting such soft services.

On cross-examination, Mr. Leach felt that low density residential development in the Town would essentially cease without annexation and that it would increase radically if annexation as proposed was approved. He felt that the Town has been doing reasonably well from a population point of view in a total Nova Scotian context when it kept its rate of population loss to the low rate that it has. He felt that the availabilty of sites for modern houses would allow people presently living in the Town to trade up from their existing older homes (thus allowing a trade up in home ownership from renters to their starter homes) and people from elsewhere in the County to move into the Town into modern single family homes. All this extra capacity in the home building and home sales market would have a very stimulating effect on the Town's economy and would not be possible, according to Mr. Leach, unless the proposed annexation application succeeded.

Mr. Leach believes there are hardly any vacant serviced lots in the Town available for single family residential development. Some of the sites that at first glance seem to provide sufficient space for single family residential development are so broken up in individual ownerships that it is impractical to develop those lands in a suitable way in sufficient volume.

Under examination by the Board, Mr. Leach noted that his position as liaison planner to the Town of Liverpool not only allowed him to act as planner for Liverpool but also allowed him to "... be able to to advise the municipality of the provincial regulations as they pertain to that municipality...".

Mr. Leach felt that the MPS for Liverpool contemplated growth of residential accommodation in the Town and this annexation was an appropriate method for the Town, under its MPS to achieve the contemplated growth.

Mr. Leach had done no study of the annexation lands in regard to bedrock conditions as they would affect the development of the annexation area as residential subdivision. He noted, however, that he had discussed the adjacent Cobb's Ridge development with its developer Nauss and that he accepted Nauss's view that the annexation area and the Cobb's Ridge were not only adjacent but very similar in topography and that since Cobb's Ridge had no troublesome bedrock, neither did the annexation area.

Mr. Leach was again pressed as to the Town's abilty to provide the piped services :

"Q. Now. Actually, there'll be no development possible, commercial, industrial or anything else until Liverpool corrects its water and sewer system, isn't that correct? Or at least plans, or commits itself to correct them.

A. Ah. Certainly if the Town were to go to the Department[s] of the Environment and Health for joint certification for the expansion and extension of their sewer services or to connect up to them, ah the indication has been from that department [sic] there would be no permit issued ah for an improvement for that purpose unless the systems were improved. The water system is not under the same situation. "

Mr. Leach felt that there was a demand for the lots to be developed in the annexation area and this position was supported by Mr. Nauss' efforts to develop the annexation area and also by the frequent inquiries Town authorities had from persons seeking, in vain, building lots within the Town.

Mr.Leach had not contemplated the point of view that the annexation area might be without any land use controls for a time after the annexation took place until Council could amend its MPS and LUB to bring the intended R-1 controls into effect to govern those portions of the annexation area intended to be subdivded into lots for single family use. He said he had looked at that problem only from the perspective of having the Council zone the annexation area R-1 as soon as it could using the standard processes necessary for amending the Town's MPS and LUB to achieve the land use controls appropriate for the intended use of the land. He made no mention that such process requires not only action by Council (which could be within the sole control of the existing Council) but also requires the consent of the Minister of Municipal Affairs which consent is not automatically granted. He was asked whether, in his opinion, the Board had any authority to impose land use controls on the land in the annexation area upon annexation to ensure the land in question could be controlled until Council, using the standard processes necessary for amending the Town's MPS and LUB to achieve the land use controls appropriate for the intended use of the land, was able to do so. This would prevent any unintended use of the subject land by the landowner in any lacuna of land use contols over the subject lands which might occurr when the land left County jurisdiction and became subject to secondary legislative jurisdiction for planning purposes for the Town. He replied:

"A. On that basis, I would certainly recommend that in making the annexation, if the Board is to determine in favour of the Town, that they would make a determination that the Town should proceed forthwith for the appropriate amendments to their Municipal Planning Strategy [Cough by another] and Land Use By-law.

Q. You haven't contemplated that before this morning?
A. Ah I have contemplated from the perspective of the Town would have to move and get those in place but not on the basis that the Board may have the authority to order that."

Mr. Leach said that, if no surveyed description of the annexation areas were available, then, because the annexation area was constrained by no easily identifiable natural boundary, a surveyed and monumented boundary ought to be put in place to define the extension of the Town.

Mr. Leach said the school property could obtain road access through the County at the north eastern boundary of the school property if road access were not provided through the rest of the annexation area to the proposed Town streets which are on or near the southwestern boundary of the school property and that appears to be the present intention of the Department of Public Works for this particular school. Mr. Leach further expressed the feeling that, if the annexation failed and road access to the Town, for the residential portion of the annexation area, to the existing Town streets

(as is proposed by the annexation application) were prohibited, no access to roads exiting in the Municipality would be allowed for the residential portion of the annexation area through the adjacent School property.

Mr. Leach said that all the other vacant sites marked available for residential development presently in the Town were less suitable for such development than the land in the annexation area for numerous, and sometimes differing, reasons such as fragmentation of ownerships, bad soil conditions, excessive drainage problems, difficult slopes excessive bedrock near the surface and other site related impediments to economical development.

Ronald Leslie Lane, Mayor of Liverpool testified next.

Mayor Lane said that annexation in general, and this annexation-because it was current-in particular, was a source of sensitive political relations between the Town and the Municipality because of the lingering remembrances of a previous (albeit unsuccessful) application by the Town to annex large portions of the Municipalty which had been made some five years ago.

Mayor Lane said that he and his Deputy-Mayor, with the concurrence of Town Council, had made sure that the present application was to annex only that portion of the Municipality that the Town needed to meet the needs of Mr. Nauss' company for developable land within the Town in a suitable location for the residential housing market as perceived by Mr. Nauss. He said great pains were taken to keep the Council of the Municipality fully informed of the nature and ongoing status of the annexation application with a view to eliminating, or at least minimizing, any possible opposition to the annexation which the Municipality might raise.

Mayor Lane's remarks showed an understanding of the Municipality's possible suspicion of the Town's motives left over from the previous failed annexation application and a need to have the Municipality understand that the Town, in its present application, was proceeding for the best of motives while at the same time attempting to cause the least possible injury to the Municipality. He hoped for the Municipality's consent to this application. When that was not forthcoming, Mayor Lane expressed respect for the Municipality's position and felt that its moderate position in opposing the present application could only help to lead to an appropriate result in the present application.

Mayor Lane went so far as to say that he felt the Board hearing process, itself, was a useful part of the ongoing effort of the Town to obtain its necessary objectives to inform the public of the annexation scheme and to defuse any irrational or intemperate opposition to the proposed annexation. He noted that, as part of the ongoing process in seeking this annexation, he had appeared at a public session of the municipal council, he had discussed the questions on an open line programme on ATV on numerous occasions. He noted that the complete absence of any opposition by members of the general public at the advertised and public sessions of the Board (one held in the evening to accommodate any persons who could not easily attend during usual business hours) indicated that the strategy he had adopted to further the Town's annexation goal was effective in informing the public, at least to the extent of disarming any active citizen opposition to the scheme.

Mayor Lane felt that if the Town were to succeed in its present application in the present atmosphere which he had helped to cultivate, good ongoing and necessary relations between the two adjacent civic bodies concerning the various issues of mutual interest to both Town and County would need to be preserved. He felt that the Board hearing process, and the preliminaries leading up to the Board hearings, served to inform the politicians and general public of the non-adversarial attitude of the Town in making the present application. Post-annexation relations between the two municipal corporations would be promoted by the catharsis which the whole annexation process allows, accoring to Mayor Lane, and therefore the failure of the Municipality to consent to this annexation should not be considered as a source of post-annexation friction with the Town.

Mayor Lane mentioned that on occasion the Town extended emergency type of " soft services " to inhabitants of the Municipality who lived on streets near the Town boundaries.

Pursuant to questions from the Board, Mayor Lane for various reasons said that it would be politically improvident for Town Council to extend hard services to the adjacent areas in the municipality on a public utility or user fee basis without at the same time extending the Town's boundaries together with such hard services. In his view, Town voters would perceive such action by Council as being an improvident use of Council's mandate and would vote out of office any Council which promoted such expansion of hard services. Mayor Lane felt that those who received the benefits of hard services from the Town should also be made responsible, through the payment of Town taxes, for the soft services that are part of the benefit and burden that go along with being a landowner taxpayer in the Town.

Mayor Lane restated that he did not want this application for annexation to give rise to inter Town-Municipality friction as had the last failed annexation application. He agreed that the Municipality's position was not so much in opposition to this particular 40 acre annexation application as it was in opposition to what future more extensive annexation applications this present application might portend. Mayor Lane, on re-examination, reiterated that the successs of this application would give the Town all the residential land it would need for development purposes for the next 10 years at least and that it already had in inventory all the land it needed for any forseeable industrial and commercial development.(Recreational land needs were hardly mentioned throughout the hearing and were not mentioned here by the Mayor. The Board assumes that land for recreational and park use was not an unsatisfied priority item for the Town.) As a consequence, the Town had no present intentions respecting futher annexations beyond the one in hand.

Mayor Lane felt that the Town, to provide and maintain an appropriate level of services to its ratepayers, had a much heavier pressure to raise it's tax rate than the Municipality had in providing an acceptable level of services to its ratepayers. He further felt that extending hard services to County residents before all intown inhabitants had achieved at least an equivalent level of servicing would be politically undesireable.

Frederick William Wendt testified for the Municipality. Mr. Wendt is the Director of Planning for the Municipality. By agreement of the parties, ratified by the Board , Mr. Wendt was qualified as an expert witness to give opinion evidence on planning matters as they affected the Town and the Municipality.

Mr. Wendt had conducted the Municipality's study required by the Board's preliminary order made hereunder. In this study he looked into the financial implications of the proposed annexation as it affected the Municipality and the Town. He felt the trend in both municipalities' areas of vacant residential land was towards the building of residential single family housing. In preparing his report, he followed much the same techniques as had been followed by the experts who had given evidence for the Town in preparing their reports.

Mr. Wendt said that under the present building restrictions respecting the building of housing in the Municipality, the portion of the annexation area not contemplated for school use (or forming part of the residential lots part in the Town and part in the area) would encompass the development of about 25 lots for single family residential use with on-site servicing for sewer and water.

Mr. Wendt noted that in recent years the Town's population trend has been for a slight shrinkage and the Municipality's population trend had been towards a growth. He noted however that the number of households had been increasing. In the Town in 1981 there had been 1165 households and in 1986 (the last year for which he had statistics) there were 1191 households: In the Municipality, for the same time period, the respective figures were 3,255 and 3,462 households. These figures included all types of households (not just single family ones) but the Municipality's ratio of single family households, in these figures, remained constant throughout at about 90% single family. In the Town, over a slightly different time frame, the ratio of single family (which in these figures included single family, row housing and duplexes) households to apartment dwelling showed the proportion of apartment dwellings increasing from 13 % to 18.5% of the total households.

The Municipality had no direct information on the location of residential building within its boundaries, but Mr.

Wendt, by noting the location of residential subdivision approvals within the Municipality, was able to satisfy himself where the great bulk of the Municipality's growth was located, and that it was predominantly single family. He said the most of this residential growth was in various areas all within a maximum of 5 kilometers of the boundaries of the Town.

Mr. Wendt noted that the Municipality's present tax revenue in the annexation area was the matter of a few hundred dollars in view of the present undeveloped state of the property and that the planned school development being non-taxable would not alter that picture for the better. In relation to the total tax picture to the Municipality that loss would be so negligible it could safely be ignored. (The Board assumes the converse that the Town's gain of such unimproved or tax-exempt property would be of no immediate benefit for the Town which could not really benefit from any annexation - property tax wise - until the proposed residential development became a reality.)

Mr. Wendt then went on to deal with the implications of the proposed annexation by dealing with its impact assuming the annexation lands were developed as proposed. Development of the annexation area as proposed, said Mr. Wendt, would yield an approximate additional $5,880,000.00 worth of residential assessment for the Town. He said there was a market throughout Queen's County for about 100 lots over a 10 year basis and what was built in the Town would not be built in the Municipality. His thesis was that there is only that total market for residential development and there was no anticipation of any large or extraordinary development projects which would cause an influx of population into the region [his word] and therefore the Town and the Municipality were head-to-head competitors for the development and marketing of vacant lots the development of which could give rise to increased residential assessment. At present, according to Mr. Wendt, Town residential single family development used up only about 1 lot a year of that 10 lot a year estimate for the region. If these 100 or so lots proposed in the annexation area were put on the market they would either absorb the total demand for single family residential development (and consequent assessment) in the region for the next 10 years (to the detriment of the Municipality's anticipated share in the single family housing market) or, if the proportions of sharing new single family residential development remained the same, then the residential development proposed for the annexation area would take at least 50 years to complete. 50 year development schedules were clearly implied by Mr. Wendt to be much too long to encourage any support for the present annexation scheme: His other alternative, he wished the Board to infer, would be very adverse financial implication to the Municipality caused by the successs of this annexation application if all these proposed houses were built within the Town in the 10 year time span proposed.

Mr. Wendt knew of the Privateer's Co-op land development which had occurred in the Town in the Cobb' Ridge area

(next to the proposed annexation area). He said this was government subsidized building of mainly single family homes designed to meet the housing needs and to accommodate the pocketbooks of middle and lower income families. He questioned whether the demand for such housing was a special demand and may have been fully met by the completion of the co-op development. Mr. Wendt wondered, in any event, whether such subsidies were still available from the government. He said a co-op development was different from the proposed development which was directed, at full market cost, at the general housing market for single family residences in the region.

As a planner, Mr. Wendt said he envisaged a role for the Town in producing the commercial center for the surrounding Municipality. He felt that the majority of apartment housing should be built in the Town's downtown core. He felt the most of the need for single family dwellings could be met, as he said it was being met now, by the development of most new single family housing in those areas of the Municipality in close proximity to the Town. Mr. Wendt went on further to say that if the Town did not apply its development potential to becoming the commercial core of the region some other town, such as Shelburne or even Bridgewater, would preempt that field and the Town would be left without valid development goals.

Mr. Wendt is the chairman of a study group that is studying the proper use of the Meadow Pond area. He has the view that the Meadow Pond's best potential use is not as a watershed yielding a potable water supply but as an area to be promoted and developed to active recreational uses.

On cross-examination, Mr. Wendt admitted that in years when the Town's development of single family housing starts was at peak numbers the Municipality also was producing large numbers of single family houses.

Mr. Wendt reiterated his belief that about 80% of the anticipated $5,880,000.00 worth of assessment would not go to the Municipality but would go to the Town were this annexation application to be granted. He noted that this loss of assessment would be a loss of assessment across the Municipality and not in the annexation area alone since development of the annexation area in the Municipality under all existing regulations would yield only 25 single family houses or about 25% of the assessment the land would yield in the proposed in-Town development. In addition the dollar loss to the Municipality would be less since the Municipality's tax rate was much lower (and has been traditionally much lower) than that of the Town.

Mr. Wendt said he was not familiar with all the financial implications of this annexation since he had been employed by the Municipality for only a short time (about a year) and had not yet become totally familiar with the suitability of the Municipality's tax base to meet the necessary demands for services for the inhabitants of the Municipality.

Mr. Wendt said he believed the residential land in the annexation area would unlikely be developed for residential use in the near future if the annexation application were to fail because one landowner owned almost all of the residential land suitable for development in the annexation area (and had said he would not develop the land if it remained unserviced within the Municipality): Mr. Wendt believed that statement of the developer.

Mr. Wendt held the opinion that the development as proposed would not cause any land use conflicts with the remaining lands surrounding the area to be developed.

Mr. Wendt's planning department was not consulted either by the Department of Public Works or by the Queens District School Board prior to the planning and location of the school in this area which is still within the Municipality.

Following the hearing of this application briefs were submitted on or about November 19, 1987 by counsel for the Town and counsel for the Municipality.

The Board is especially required to consider the factors set out in Sections 6 and and 22 (1) of the Municipal Boundaries and Representation Act in coming to a decision on this application for annexation. Those sections state:

> "6. Upon an application to the Board, the Board shall inquire into and take into account the necessity or expediency of the order applied for, the financial position and obligations of the municipalities afffected, the burden of taxation upon the ratepayers, and all other relevant matters that in the opinion of the Board appear to be necessary or expedient.
>
> 22 (1) The hearing of the application shall be in accordance with the Municipal Board Act and the Board may, if satisfied that the order is in the best interests of the inhabitants of the area, taking into consideration the financial and social implications of the order applied for, grant the order of amalgamation or annexation."

The Town's position is spelled out in the evidence of its witnesses and the Board believes it may be fairly summarized thus:

1.Liverpool is in a condition of slow population decline, albeit at a recently slackening rate.

2. If that rate of decline continues the Town's existence as a viable civic corporation will be imperilled; its raison d'etre threatened.

3. The Town's MPS recognizes as part of its goal the proper growth of the Town in all its aspects including an increase in population and the necessary housing to house the same and sufficient tax base to provide the services for its population.

4. There is a need within the Town for vacant serviced residential lots to fulfill a demand for single family housing (the current housing of choice) within the Town boundaries. The Town believes that there is virtually no development of that type wihin the Town because there is no servicable land, economically developable, located within the Town boundaries. There has been no recent large scale single family residential development within the Town because of the absence of appropriate land for the same and not because there is no demand on the market for serviced lots.

5. A developer, in the form of the Nauss landowner of 40 acres adjacent to the Town, has proposed a 100 lot residential subdivision serviced by sewer and water and acquiring street access through joining the Town systems for

the same. The developer owns (or owned) the entire 40 acre annexation area, has sold about 10 acres which is becoming a school site, and proposes to develop the rest into a residential subdivision of single family residential lots and has said that he will not develop the residential portion of the annexation area unless it becomes part of the Town.

6. The Town can meet its demand for single family residential housing provided it encourages the developer by annexing its land (which is in the Municipality) and assisting it to service and develop its land into a residential subdivision.

7. No persons actually have their homes in the annexation area. All landowners in the annexation area (of whom the developer Nauss was the predominant one at the time of the annexation application) have consented to the annexation application.

8. The Town believes this development is necessary and expedient for the Town, of little damage to the Municipality, and will promote development which would not otherwise occur.

The above 8 topics, in the view of the Board, accurately summarize the Town's positive position on this application.

The Municipality's tempered opposition to this application may be fairly summarized, in the view of the Board, as follows:

1. The Town has had a history of making extravagant claims for municipal territory in previous annexation applications (which incidentally failed) and the Municipality felt that the full hearing accomplished by the public hearing process provided for under The Municipal Boundaries and Representation Act would serve as a safeguard, and a useful source of scrutiny, to ensure that the present application is not likewise extravagant in its claims or in its final results.

2. The Municipality has grave concerns that the present application is merely " the thin edge of the wedge " and that , if it succeeds, it will be the harbringer of more and yet more attempts to wrest yet more soil from the control of the Municipality.

3. The Municipality noted that the Town would have environmental problems if it should attempt to service the annexation area with sewer and water.

4. Given the positions stated in paragraphs 1, 2 and 3 supra, the Municipality was not greatly incensed with this particular attempt at annexation and adopted an open minded approach to the annexation application itself.

5. The Municipality questioned the demand for residential housing which formed the basis of the Town's annexation application. It felt that the Town's benefit in residential assessment would detract from the amount of residential assessment that would otherwise, in large measure, go to the Municipality.

The Town countered that argument by saying that there was a larger demand for new housing than the Municipality estimated, that the demand was being frustrated by the present location of the political boundaries between the Town and the Municipality and that there could be more residential building in the region than the Municipality thought possible: In any event, the Town said that the Municipality, having a much broader assessment base for its tax needs than the Town, could better sustain the loss of the proposed scale of residential assessment than the Town which needed the increased growth to help ensure its continued existence.

As to the environmental issue, the Town said that it had to be cured and to cure it the Town was pursuing a " ten year plan " designed to assist the Town to provide proper water supplies for the annexation area and sewer treatment facilities which would cover the sewage treatment needs of the enlarged Town.

The Board has heard all the evidence made available to it on all these major points. It notes that neither of the Ministers of provincial government departments invited in the preliminary order of the Board to participate in these proceedings has chosen to do so in person or by proxy. It further notes that the Queens District School Board, ordered in the Board's preliminary order herein to participate in this hearing with a study, has not done so and has made no communication with the Board concerning its default. The

Queens District School Board wrote to Mr. Dispersio by letter of May 25, 1987 (Exhibit L-20) and said therein:

> " With reference to your letter of April 22, 1987 regarding the Annexation Application of the Town of Liverpool and specifically with page 3, paragraph 4. [sic]
> Please be advised that the Queens District School Board does not envisage anyparticular financial implication of the proposed annexation to the Province and to the Queens District School Board arising from the proposal to locate a school within the area to be annexed.
> If you have any questions, please do not hesitate to contact me."

The above letter was signed by one John Rowinski describing himself in the signature portion of the letter as "Chief Financial Officer. In the letterhead he used the Chief Financial Officer for the Queens Distric School Board was listed, third in order, as one David P. Clattenberg.

Given these possible lacunae in the evidence, the Board believes the following have relevance to the factors which the Board must consider in determining whether the annexation should be granted ,in whole or in part:

1. The validity of the alleged need of the annexation of this particular land in whole or in part to the Town.
2. The ability of the Town's services to undertake the extra annexation related load from an environmental point of view and the ensuring that all necessary environmental solutions are locked into position.
3. The maintence of proper land use controls, if annexation is granted, between the effective date of annexation and the date Council, with the consent of the Minister of Municipal

Affairs, installs what they together consider the proper land use controls in any possible area annexed.

4. The necessary timing, in any annexation, to allow for the voting in municipal elections and the separation of the assessment between the two municipal bodies.

Neither counsel felt the need to ensure the compliance of the Queens District School Board with the order of this Board that it had ignored. Given the attitude of counsel, the Board had no desire, on its own motion, to pursue the matter further. The Board was unable to determine from the secondary evidence before it whether it was necessary or expedient that the approximately 10 acres to be occupied by the proposed school be annexed to the Town.

Supporting this finding of the Board is further and sufficient evidence before the Board that shows:

1. The construction of the school can go forward either in the Town or the Municipality;

2. The proposed school can receive its street access from the Municipal side without reference to existing Town streets if the Town should prove unwilling to allow access to the proposed Town streets to be constructed within the annexation area.

3. That that the school can probably be built with on-site sewer and water services.

4. The school site itself is so configured that it is severable from the residential portion of the proposed annexation area. Thus the residential portion of this annexation area can proceed to be considered for annexation

independently of the portion of the annexation area occupied by the school site. Such a severance of the area proposed to be annexed was done by the Board in Town of New Waterford v. Municipality of the County of Cape Breton NSMB-17-86-MB, leave to appeal to Appeal Division refused S.C.A.01868, subsequent certiorai denied (1987) S.H. 62874 (unreported).

5. The presence or absence of the school property either now, or when developed, will add or subtract little to the municipal tax base in the municipality in which it may be located.

The Board therefore, for the reasons just stated, will at this point in its decision eliminate the so-called school property from any further consideration as being possibly added to the Town in this annexation application. If it becomes necessary in the further consideration of this annexation application to allow any part of the application, methods will be spelled out as to the definition of the excluded school property and to provide for the severance of the annexable land from the non-annexable land.

Although counsel cited no works of local historians to establish the precise time the location of the inter-municipal boundary between the Town and the Municipality (at the point in question) had been set, the Board is persuaded it has enough evidence before it that the inter-municipal boundary has been set for some considerable, one might say historical, length of time and the Board should not lightly depart from that status quo except for good reasons.

The Board has listened with care to all the evidence adduced in this application and it is able to make the following findings of fact which deal with the remaining residential portion of the annexation area (which it will now refer to as the " residential area"):

1. The Board believes Mr. Nauss when he says that his company will not promptly develop the residential area unless that area is first annexed to the Town and commitments are made to his company by the Town to provide it with Town central sewer and water services and access to nearby Town streets. If the land is not developed promptly by Mr. Nauss' company it will be of no substantial source of assessment either to the Municipality or to the Town although the existence of a new school on the adjacent 10 acres will make the residential area more desireable for residential development and thus will probably increase the value of the land and therefore its assessment to some extent and might put more pressure on the Nauss company to develop the land as residential even within the present regulations of the Municipality.

2. The Board is of the opinion, from the optimism of Mr. Nauss in promoting this development and from the attitude of the Town in supporting him, that there is probably a market in the Town for the residential housing proposed to be built in the residential area which can be successsfully marketed when built. From the evidence, the Board is of the opinion

that, so far as anyone can predict the future, the Town has proven that this construction in the residential housing market, if made within the Town to the density and timing proposed, will not likely dry up the entire housing demand for the region (as suggested in the evidence of Mr. Wendt) while any portion of it remains developed and unsold: this predictive view of the Town, in the view of the Board, flows logically from the evidence it heard concerning the last peak time of housing development in the Town. At that time housing starts were also running well in the Municipality. Thus, to the extent that the Board may presume to engage in predictions of future facts, the Board accepts the prognostications of the Town's witnesses as to the future market for housing and how it could be met as proposed in the residential area without seriously injuring the contemporaneous construction of new residential development within the Municipality.

3. The Board accepts the theme, perhaps best expressed by the Mayor's evidence, advocated by the Town that it is applying for this annexation in the least confrontational manner possible with full regard for the sensibilities of the Municipality and its interests in protecting its own turf.

4. The Board is of the opinion that the Town has shown that it needs fresh residential assessment to help it meet the demands for services and it needs residential building to help it stop declining in population and start to grow again. The Board, furthermore, is of the opinion that the

evidence has shown that without the residential area being added to the Town there is no suitably economical raw land within the Town which could be developed to the same advantage for the Town.

5. The Board accepts the evidence of the Town that it now has in place what it calls a " ten year plan " to install improvements in the Town's water and sewage disposal systems which should allow those systems to correct existing deficiencies in those services and, at the same time, service the residential area. The Town is seeking both provincial and federal governmnent aid to fund its somewhat belated " ten year " plan " and has received some contributions and has made some financial commitments in the fulfillment of the ' ten year plan ' ".

6. The Board finds from the evidence before it that there are grave deficiencies both in the water delivery system of the Town, the sewer " delivery " system of the Town and the sewer treatment facilities of the Town as they now exist and these deficiencies cause danger to the existing inhabitants of the Town. The sewer and water services as they now exist are unable to serve the present need of the Town's inhabitants for sewer and water let alone the 100 house expansion which is proposed for the residential area. The Board has been told by the Town witnesses that there is a joint Health and Environment ban on any futher development in the Town unless the " ten year plan " is implemented. Unless the " ten year plan " is implemented, grave health

risks may accrue to the inhabitants of the Town- or so one must assume from the Health- Environmental ban.

7. The complete absence of the invited direct provincial input of at least information to this hearing leads the Board to conclude that there is presently no committed financial support to the Town's " ten year plan ". The financial "necessity" pleaded by the Town as one of the needs for increased assessment to flow from the proposed annexation, and the Town's seeking provincial and federal funding for its " ten year plan ", make the Town's allegation that it will implement the " ten year plan " regardless of what financial assistance is made available from senior levels of government sound somewhat hollow in the ears of the Board. Even if the present municipal regime were to fund the " ten year plan " for the rest of its mandate, there is a council election scheduled for the fall of 1988 and at least three more general municipal elections for Council before the expiry of the " ten year plan." The Board holds the opinion that there is some degree of risk that the " ten year plan " may never be fully implemented if the Town is left on its own to finance the cure for its pollution control problems.

The Board is reinforced in this view of the minimal steadfastness of Council in implementing and carrying out its " ten year plan " by the fact that the plan was not adopted by Council until after the Board had heard its preliminary application in this matter, given in its order requisitions seeking environmental information, and the Town had received " static " from, it appears, someone in the Department of Environment concerning any future development within the Town until the sewer treatment problems were rectified. The Town's first reaction was not to cure the problem because it was so severe. Only after exploring other solutions to the development constraints did Council " adopt " its " ten year plan."

The Board does not believe Council would easily attempt to so avoid an apparently unbiased environmental opinion on so profound a matter as sewage treatment failure unless it was unsure of its own political will or ability to sustain, on the resources of the Town alone, the completion of the necessary " ten year plan."

The Board has no legitimate concern with the Town's existing and admitted water and sewer problems as they presently exist within the Town's present boundaries. When, however, the Town proposes to annex an area the Board of necessity must consider many things including "... the financial position[s] and obligations of the municipalities affected, the burden of taxation upon the ratepayers, and all other relevant matters that in the opinion of the Board appear to be necessary or expedient."[emphasis that of the Board]. If the Board is satisfied of many things, including the " social implications of the order applied for ", it may grant the order for annexation.

The Board, having considered all items required of it by the Municipal Boundaries and Representation Act with particular emphasis on the matters listed in the preceeding paragraph of this decision, considers that the present lack of ability of the Town properly to contemplate any further development in the Town because of its inability at present to provide the proper level of hard services is a " social implication " which the Board has the duty to consider when deciding whether or not and what type of annexation order it should grant in this application.

Given the present public concern for matters affecting the environment and in light of the evidence adduced herein,the Board could not permit the annexation of the residential area as being either necessary or expedient unless it were satisfied that the Town were locked into its " ten year plan ", that the " ten year plan " was at least designed to proceed " Bras-dessus, bras-dessous " with the planned progress of development in the residential area, and that the Town (and the Board) was satisfied that it had a firm commitment from at least one other level of government for the ancillary funding for the " ten year plan " necessary to give encouragement to the voters of the Town that they will be more inclined to support the " ten year plan " to its completion.

The Board, without deciding the issue, is taking the position in this application that it has no power to order either the federal or provincial governments to support the Town in the financing of its necessary " ten year plan ".

The Board is of the opinion that it should withold its approval of any annexation sought by the Town until the Board can be satisfied, for the reasons set out above, that the Town has its " ten year plan " sufficiently locked in that it becomes safe for the Board to answer affirmatively the " begged question " and to permit the annexation to the Town of the residential area which was included in its application herein.

As usual in these applications under the Municipal Boundaries and Representation Act the Board has the problem of determining who are the "inhabitants of the area " and what is the " area." (see Section 22(1) of the Municipal Boundaries and Representation Act). If the " area " is meant to be the area annexed then, in this case, there are either no human inhabitants located in the area [no residential houses appear to be built in the area] or those people who inhabit houses located in the Town the lots of which protrude into the area are the inhabitants of the area. If it is the former, the Board has difficulty in perceiving that the annexation is [or is not] in the best interests of non-existent inhabitants. If it is the latter, then all the inhabitants of the area have specifically consented to the annexation application and, since their consent is a fair indication that the inhabitants, at least, believe the annexation to be in their own best interests, the Board has no great difficulty on the evidence in this case in concurring with them, subject of course to the overriding environmental caveats outlined above.

If the " area " includes the Municipality in its entirety and all of its inhabitants then the present annexation application, from the evidence tendered herein, has little or no effect on those inhabitants and thus could be said to be neutral as respecting their best interests. If the " area " includes only the annexation area and the immediately surrounding portions of the Municipality then the evidence indicates there are still no inhabitants and the Board has difficulty in perceiving that the annexation is [or is not] in the best interests of non-existent inhabitants.

If the " area" includes the annexation area and the Town in its entirety then, on the evidence outlined above, the Board is satisfied that the annexation, as reduced by the Board, is in the best interests of the inhabitants of the Town, subject, of course, to the overriding caveats outlined above.

The Board can see no distinction from the immediately preceeding category if the " area " includes merely the annexation area and the immediately adjacent area of the Town: the Board is satisfied that the annexation as reduced by the Board is in the best interests of the inhabitants of the Town, subject of course to the overriding caveats outlined above.

In any definition of " area " the Board can think of, the effect of the consideration of the " best interests of the inhabitants of the area " results in a conclusion that the effects are neutral or favour annexation. There is no room, in the judgment of the Board, in any reasonable circumstance herein, for a conclusion that annexation is contrary to the best interests of the inhabitants of the area. That finding, in itself, is not sufficient. For an annexation to be permitted there must be a positive finding based on a preponderance of evidence that the annexation must be in the best interests of the inhabitants of the area.

With the governing statute written as it is and in order in each case to give the statute some reasonable meaning, the Board has to use some flexibility in each annexation case in determining, for the purposes of the current application, the " area " intended by the Legislature. The Board in this case determines that the " area " to be considered consists of the annexation area, the other portions of the Municipality immediately adjacent to the annexation area and, at least, those portions of the Town immediately adjacent to the annexation area including, again at least, the Cobb's Ridge Subdivision. With the " area " thus defined, for the reasons outlined above, the Board is of the opinion that the annexation of the residential area to the Town, subject to certain overriding conditions and stipulations, is both expedient and necessary and in the best interests of the inhabitants of the area.

The Board notes that the five residential lots located mainly in the Town and partially in the Municipality and forming part of the residential area have functioned as they presently exist for some considerable period of time without any apparent undue stress being occasioned to any person because of their houses and frontages being mainly located in the Town and their backyards being to a large extent located in the Municipality. Since, however, there is an annexation application afoot in which these particular lots are caught up and which can be granted in part, and since the inhabitants of these divided lots have consented to their being annexed to the Town, and since the divided lots can more conveniently be dealt with for certain governmental purposes [such as assessment] as part of the Town, the Board finds the annexation of the Municipality's portion of the divided lots be annexed to the Town to be expedient, although not necessary, in the circumstances. Had the Town's application been for the annexation of the Municipality's portion of the divided lots, alone, there would have been no necessity for the annexation to succeed and the Board might have had to reconsider that annexation in the light of the balance of expediencies. In this case, with this little caveat noting the distinction between the Municipalty's territory contained in the divided lots and the Municipality's territory in the annexation area designated for new residential subdivision, the Board treats all of the residential area alike.

The Town has applied for annexation of a certain area of the Municipality unconditionally: the Board is only prepared to grant the Town approximately 3/4 of the area it wishes to annex and, then, only upon certain conditions. The Board is prepared to issue an order embodying those conditions and the further supervision of the implication, to the Board's satisfaction, of those conditions.

In deciding as it has, the Board, however imperfectly, has attempted to meet the demand for expansion which the Town appears in all sincerity to wish while providing the Town the maximum encouragement within the Board's power to correct longstanding (almost chronic) environmental and health conditions with the help of all other levels of government.

The Board realizes that the Town may not wish to annex as restricted by the Board and feels that the Town may wish to abandon (as it can at any time until the final order herein) this application. In order, if it so wishes, that the Town be encouraged to exercise its abandonment option quickly the order granted pursuant to this decision will set a deadline for any decision the Town may make to abandon this application.

The order flowing from this decision will have certain " housekeeping " provisions which will help the satisfactory effecting of this annexation application. They are:

1. Peripheral survey and monumentation of the residential area to be annexed so that it will include:

(a) those portions presently in the Municipality of the lots partly in the Town and partly in the Municiaplity and graphically shown on Exhibit L-5 as " Lands of Gerald Chute, Lands of Victor Kempton, Lands of Charles MacKay, Lands of F. Ritcey, Lands of Clifford Sandford ".

(b) the land in the annexation area graphically shown in Exhibit L-29, not already included in (a) supra, which is not presently owned by the provincial government for school purposes.

2. Production of a plan satisfactory to the Board following upon such survey and monumentation and a method of filing such plan so that the Town/Municipal boundary which here follows no natural boundaries may be available for posterity.

3. Production from the plan and survey mentioned in 1 and 2 supra a metes and bounds description satisfactory to the Board to be added as a schedule to the final annexation order herein. The annexation area asked for in the application for annexation is a relatively irregular shaped figure without " natural " geographic boundaries having visible monuments such as roads, seashores, lakeshores or streams. The residential area, a portion of the annexation area applied for, approved for annexation by the Board is even more irregular and unmonumented in its boundaries and needs a proper description to be included in the final annexation order.

4. A development freeze of the land contained in the residential area as herein defined by the Board under its powers under Section 5 (b) and consequentially Section 5 (m) of the Municipal Boundaries and Representation Act pending the abandonment of this annexation application by the Town or its zoning pursuant to the appropriate changes made by the Town subsequent to the final order for annexation, whichever first occurs. This freeze will prevent any development of the land in the annexation area until the

Town can get in place effective planning and development controls of its own choosing.

The above four " housekeeping " measures seem to the Board only to be logical in the circumstances.

The Board will also in its order following this decision have clauses enforcing the conditions necessary to permit the annexation within the environmental parameters set out above and to permit further supervision of the Board as to the documentation of the implementation of those environmental and financial plans and commitments envisaged by the Town's " ten year plan."

The Board further realizes that the Town may wish to obtain financial help from other levels of government but may, after all due effort, fail to receive such commitments as will satisfy the Town and/or the Board. In such circumstances the uncertainty inherent in an unresolved annexation application can act to the detriment of both municipalities involved and to the detriment of the developer who is the catalyst of this particular application. A certain amount of delay and therefore uncertainty is built into the annexation process. The Board should see that this " window of uncertainty " be not left open too long. A practical limit, on the facts and conditionality of the result spelled out in this decision would be the closing of the Town's and the Municipality's assessment rolls for the 1989 taxation year. The Town, if it wishes to proceed with its attenuated annexation application, should have in its hand sufficient senior level governmental commitments, satisfactory to itself and to the Board, to help finance its " ten year plan " on or before December 1, 1988. If the Town cannot persuade the appropriate senior level(s) of government so to commit itself (themselves) by that time, then the Town should be prepared to have its annexation application dismissed in its entirety so that the communities involved be no longer kept in a state of uncertainty because of this outstanding annexation application. The Town appears now to be ready to do its proper part in proceeding with its " ten year plan". From now to December 1, 1988 should be enough time for other interested levels of government, if they are going to, to commit money to the completion of the Town's " ten year plan".

The Town's annexation application therefore succeeds in part and conditionally. Costs have not been addressed by either party directly involved in these hearings. This decision envisages a conditional order followed shortly by either an abandonment of the application by the Town or a hearing to satisfy the Board that the conditions of the order now to be granted have been met. Depending on whether or not there is such a further hearing the matter of costs may be addressed at such hearing; or, by the Board, based on its present information, in the case of abandonmnent of the application by the Town.

An order will issue accordingly.

Dated at Halifax this 22nd day of March, A.D., 1988.

Richard L. Weldon
Member

RE: MUNICIPALITY OF THE DISTRICT OF LUNENBURG

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

The Municipality applied to confirm the existing polling divisions and number of councillors and to alter certain boundaries. The application left District 10 (Tancook Island) 89% below average. A problem arose because volunteer firemen were required to live within certain political districts.

HELD: The Board approved the application.

The Board generally becomes concerned when variations exceed ± 33 1/3% from the norm. Representation by population is the principal in setting municipal polling districts. Population density has to be considered in relation to the facts of community of interest and geographic area.

District 10 (Tancook Island) is 89% below the norm. The Island is geographically apart from the rest of the Municipality and has its own community of interest.

Fire District Rules require volunteer firemen to reside in a particular district. Fire District lines may not follow polling district lines. This Board has no jurisdiction to determine Fire District lines.

NSMB-35-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE DISTRICT OF LUNENBURG** for the confirmation of the number and approval of certain changes in the Boundaries of the Polling Districts and for confirmation of the Number of Councillors to be elected from each Polling District.

BEFORE: MICHAEL JOHNSON, C.A., Chairman.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE DISTRICT OF LUNENBURG** (hereinafter referred to as the "Municipality") for the confirmation of the number and approval of certain changes in the boundaries of the Polling Districts in the Municipality and for confirmation of the number of Councillors to be elected from each was heard in Lunenburg on February 25, 1988 after due public notice in the Lunenburg Progress Enterprise and the Bridgewater Bulletin, two newspapers circulating in the Municipality.

Mr. Philip Romney appeared as counsel for the

Municipality, together with Mr. David E. Steele, Chief Administrative Officer, Mr. Arthur Young, Chairman of the Finance Committee, Mr. Lee Nauss, Warden, and Councillors Cyril Ernst, Dave King and Dianne Tanner.

During 1987, the Municipality caused a study to be done reviewing the fairness and reasonableness of the polling districts, and decided by resolution dated January 27, 1988 to request certain changes that would better equalize the number of voters throughout the polling districts. By Resolution dated February 25, 1988, the Municipality proposed a new boundary line to divide Districts 1 and 4, through the centre of Spectacle Lake.

The major boundary changes proposed by the Municipality affect Districts 8, 9 and 15. The 1985 voter statistics for the last municipal general election in the District of Lunenburg were as follows:

DISTRICT	NO. OF COUNCILLORS	1985 VOTERS	VARIATION	PERCENT VARIATION
1	2	2,173	(201)	(16%)
2	1	1,203	(84)	(7%)
3	2	2,694	60	5%
4	1	1,595	308	24%
5	2	2,801	113	9%
8	1	1,346	59	5%
9	2	3,541	483	38%
10	1	248	(1039)	(89%)
13	1	1,540	253	20%
15	1	877	(410)	(32%)
TOTAL:	14	18,018		

AVERAGE: 1,287 (Voters per Councillor)

The Board generally becomes concerned when variations exceed a ± 33 1/3% variation from the average number of voters per councillor. The principle of representation by population demands that each citizen's vote carry approximately the same weight when determining elected representatives. The population density, however, has to be considered in conjunction with the factors of community of interest and geographic area. In the case of District 10, being 89% below the average, the polling district encompasses Tancook Island, which is geographically set apart from the rest of the Municipality, and which also has its own community of interest. The Board is of the opinion that this District should continue to be represented by its own councillor for the present time.

The other District which exceeds a ± 33 1/3% variation from the average is District 9, which is 38% above the average population. District 15 is quite low, being 32% below the average. To correct this voter imbalance, the Municipality has proposed that four areas from District 8 be transferred to District 15, which would include Voglers Cove, Broad Cove, Cherry Hill and Crousetown. The Municipality indicated in its application that this would transfer approximately 517 voters to District 15.

The Municipality also proposed that 795 voters be transferred from District 9 to District 8, primarily from Hebbville and Hebb's Cross. The Municipality has suggested these changes, which affect three different districts, to maintain community of interest wherever possible, and to maintain geographic continuity. The changes in voter population will bring all the districts within a ± 26% variation, except for Tancook Island which has been noted above. The Board is of the opinion that these changes should be approved.

The final change which was presented by the Municipality was a slight change in the boundary line between Districts 1 and 4. The present boundary line crosses a subdivision, the property of Pine Haven Development Limited, leaving some properties in District 1, and their neighbours or future neighbours, in District 4.

The evidence at the hearing indicated that all future development would likely occur in District 4, as the lands in District 1 are watershed lands that would require a special permit for development. The main problem with where to draw the line seemed to result from fire district lines which require volunteer firemen to reside in a particular district. The Board is of the opinion that Council carefully considered this matter, and reviewed at least four possible options before deciding to use the centre line of the Spectacle Lakes to be the dividing line, with everyone on the Bridgewater side of the Lakes to be in District 4 and those of the Lunenburg side to be in District 1. The Board agrees with the Resolution of Council as to where the boundary should be drawn, and would note that this change affects very few voters overall. It was indicated at the hearing that fire district lines may not have to follow polling district lines. The Board is hopeful that it will be possible for the problem to be resolved in this manner because the establishment of fire district lines is beyond the Board's jurisdiction.

The Board has reviewed the application of the Municipality, the evidence presented at the hearing and the previous decision of the Public Utilities Board concerning these boundaries. The Board is of the opinion that the application should be approved as submitted and an Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 7th day of March, A.D., 1988.

MICHAEL G. JOHNSON, C.A.,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD

RE: MUNICIPALITY OF THE COUNTY OF PICTOU

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-MUNICIPAL BOARD ACT, S. 16(2); 17.

In 1981 P.U.B. had confirmed polling district boundaries and ordered the Municipality to rectify its voter imbalance in the next review. Council did a study and provided the voter statistics to the Board but applied to continue the status quo. Board issued a preliminary decision ordering a new application. Council made a new application amending the boundaries but no reduction in the number of Councillors. Many of the voter imbalances were removed by the boundary changes.

HELD: The Board approved the appliction. The Board would not delay the implementation.

The serious imbalance in polling districts was the cause of the Board's preliminary decision. Seven of the eight polling districts have been re-arranged to fulfill the guideline. District 13 is still 45% above the average.

The Board will approve the application. The Board still has a number of concerns among which are the voter imbalance in District 13 which is still 45% above the norm. The Board thinks that many of District 13's voters along route 347 could easily go into District 17 without destroying the community of interest.

Fire district boundaries were not polling district boundaries. Fire district boundaries are set with reference to the location with the fastest response time.

NSMB-36-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S. 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE COUNTY OF PICTOU** for approval of changes to the Boundaries and the confirmation of the Number of Polling Districts and the Number of Councillors to be elected from each Polling District.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman,
LINDA D. GARBER, Vice-Chairman
RICHARD L. WELDON, Member.

DECISION

The application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE COUNTY OF PICTOU** (hereinafter referred to as the "Municipality"), for approval of changes to the Boundaries and the confirmation of the Number of the Polling Districts and the Number of Councillors to be elected from each Polling District, was heard at the Council Chambers, Pictou, Nova Scotia, on March 24, 1988, after being advertised in the Chronicle Herald and The Evening News, two newspapers circulating in the Municipality. The application had been first heard on December 11, 1987.

The second hearing was convened to review the new proposal submitted by the Municipality in response to the Preliminary Decision issued by the Board in this matter on December 24, 1987, which stated in part as follows:

> "The Board is not prepared to confirm the existing boundaries of the polling districts or the existing number of councillors. This preliminary decision is being issued with the intention that the Municipality will review the application and submit a proposal by February 15, 1988, which will adjust the existing inequities.
>
> Failing such action, the Board will have no choice but to issue an order to the following effect:
>
> (1) Polling Districts 1 and 12 will be combined;
> Polling Districts 3 and 4 will be combined;
> Polling Districts 5 and 8 will be combined; and
> Polling Districts 16 and 17 will be combined.
>
> (2) The number of Councillors will be reduced from 17 to 13."

The deadline for submitting the proposal was subsequently extended to March 9, 1988.

T.E. Margeson, Q.C., appeared as counsel for the Municipality.

At the second hearing, the Warden Mr. Hank Dunnewold stated that Council had assigned the Law Amendments Committee to review all the boundaries of the seventeen Districts located within the Municipality and make recommendations to Council for changes. The proposal received final approval of Council on March 7, 1988 and called for boundary changes to Districts 1, 3, 4, 5, 6, 7, 8, 10, 11, 12, 15 and 17. There were no changes recommended for the other five Districts or to the number of Councillors to be elected. The Warden then briefly reviewed the recommended changes and the reasons therefor.

Following the Warden's testimony fifteen other people appeared before the Board including eight Councillors. The testimony included objections to the Riverton area being removed from District 15 and included in 11, objections to the Hillside area being removed from District 10 and included in District 1 (Pictou Landing) and objections to the Board's previous suggestion of combining Districts 3 and 4.

Common throughout much of the testimony was a concern for the preservation of Fire Districts in the Municipality and the effect that changes to the Polling Districts might have on these fire district boundaries which might cause a breakup of established communities of interest, difficulties relating to area fire rates and increases in response time to fire emergencies. Warden Dunnewold indicated in his testimony that Fire Districts were not tied to Polling District boundaries and that there was no problem with a polling district having more than one fire area within its boundaries and necessary adjustments could be made by internal administrative procedures. On further questioning by the Board of the Warden and other witnesses, the Board is of the opinion that Fire Districts were set with reference to the location with the fastest response time. There are Polling Districts with two or more fire departments within existing boundaries at present.

In fact the Hillside area of District 10 receives its fire protection from the Town of Trenton.

Another common concern expressed to the Board was the use of the centre line of roads as lines for determining the proposed boundaries. This tends to split neighbourhoods and can cause area rate problems.

The Municipality submitted the following voter statistics based on the 1985 municipal elections:

DISTRICT NUMBER	PROPOSED VOTERS	PROPOSED VOTER PERCENTAGE VARITION	1985 VOTERS	ACTUAL VOTER PERCENTAGE VARIATION
1	750	- 16.2%	511	- 42.9%
2	920	+ 2.7%	917	+ 2.5%
3	700	- 21.8%	650	- 27.2%
4	700	- 21.8%	515	- 42.3%
5	800	- 10.6%	474	- 46.9%
6	1,100	+ 22.9%	1,278	+ 42.9%
7	1,000	+ 11.7%	1,343	+ 50.2%
8	750	- 16.2%	862	- 3.5%
9	1,120	+ 25.1%	1,111	+ 24.2%
10	1,050	+ 17.3%	840	- 6.0%
11	1,100	+ 22.9%	1,196	+ 33.7%
12	700	- 21.8%	730	- 18.3%
13	1,300	+ 45.2%	1,301	+ 45.5%
14	775	- 13.4%	771	+ 13.7%
15	1,050	+ 17.3%	1,316	+ 47.2%
16	740	- 17.3%	737	- 17.5%
17	700	- 21.8%	654	- 26.8%
TOTAL:	15,255		15,206	

AVERAGE: 894 (voters per Councillor)

The Board generally becomes actively concerned when variations exceed a ± 33 1/3% variation from the average number of voters per councillor. The serious imbalance in existing Polling Districts in Pictou County was the cause of the Board's preliminary decision. The Board is pleased to note the new proposal shows considerable improvement in seven of the eight districts which previously exceeded this guideline. District 13 still remains at 45% above the average.

Evidence was presented by the Warden and District 13 Councillor, Eldridge MacIntosh, that initially the Law Amendments Committee proposed that part of Thorburn, MacPhersons Mills, Greenvale and Blanchard be removed from District 13 and include them in District 17. There was no evidence of the number of voters involved in the proposal. Councillor MacIntosh was against the proposal because of the various communities of interest, the possible split in fire departments and expressed the view that "the voters didn't want to move". In the final recommendation to the Board, Council made no change to the existing boundary of District 13.

It was also indicated by the Warden and District 10 Councillor, Allister MacDonald, that there was a further change in the original proposal by the Law Amendments Committee. It was discovered at Council that the proposed boundary line between new District 1 and new District 10 placed Councillor MacDonald's residence in District 1. The line was re-drawn to maintain the Councillor's residence in District 10.

All other changes were accepted by Council as proposed by the Law Amendments Committee.

After careful review of the voter statistics, the various communities of interest involved and the testimony and presentations at both hearings the Board is prepared to approve the application of Council.

However, in doing so the Board still has a number of concerns and wishes to make the following comments. The voter imbalance in District 13 must be addressed by the next application to the Board at the latest. From a review of the map it is difficult to determine why the community of interest represented by Thorburn, MacPhersons Mills, Greenvale and other communities along Route 347 could not equally be served by the Councillor for District 17. That Councillor already represents communities on this highway as it passes through District 17 on its way through District 14 to the Antigonish border. Also because of their geographical location fire services would not change for these communities.

The Board is concerned about the adjustment of the line between District 1 and District 10 to accommodate the Councillor for District 10, and would suggest that Council continue to look for an alternative solution to this situation.

In response to objections to the proposed movement of Hillside from District 10 to District 1 (Pictou Landing), the Board refers to Councillor MacDonald's testimony at the [illegible] hearing in which he indicated that District 1 and 10 were very close together with the same type of characteristics and similar concerns. The Town of Trenton divides present District 10. Pictou Landing and Hillside are very close but the other parts of District 10 have a different community of interest. The Board shares this view and finds it difficult to understand how a move to District 1 can adversely affect the ballfield and other facilities presently enjoyed by the residents of Hillside. Other than the accommodation referred to above the community itself is not split.

The Board has reviewed the concerns raised in connection with the proposed move of the Riverton area from District 15 to District 11. It appears from the evidence that the Riverton area is a very active community. Here again, the Board has difficulty in discerning how the community and its institutions can be as adversely affected as predicted by the witnesses simply by including the whole community in a different Polling District. Other than the use of roads as a district line, which will be addressed later, the community remains intact. There will not be a barrier located at the new boundary. The roads and thus the people will still travel north and south.

A number of Councillors raised concerns about the extra time required to service the high number of summer residents in the Districts bordering the Northumberland Strait. The Board accepts this argument to a degree in justifying a greater variance from the average number of voters per Councillor for these Districts but strongly recommends that careful monitoring of the voter population be maintained to insure that these districts do not exceed the acceptable variation from the norm.

In light of the evidence presented the Board finds that fire districts will not be adversely affected by the proposed changes and that communities will continue to be serviced by the closest and best fire services in their area. There should not be any disruptive change to fire protection services caused by the proposed voting district boundary changes. The Board also accepts the assurance that adjustments to affected area rates, grants, levys, etc. can be handled administratively and losses to the various affected communities will not occur.

The Board will not grant the Warden's request that implementation of the proposal be delayed three years. The Board is charged by the Municipal Boundaries and Representation Act with the responsibility under Section 17 to review every six years "the fairness and reasonableness of the number of Polling Districts and of the number of Councillors to be elected from each" and by Section 16(2) to "give consideration among other things to population density, community of interest and geographic size...". In doing so the Board accepts the basis that representation by population is a fundamental principal under which this country operates. Therefore, equality of voter representation is the paramount consideration to all reviews. Community of interest and geographic size and location, although important, are secondary considerations.

A review of the voter percentage variations for

1973, 1979 and 1985 indicate that in 1973 two districts exceeded ± 33 1/3%, three exceeded 20% and one exceeded 15%. In 1979, five exceed ± 33 1/3%, four exceeded 20% and two exceeded 15%. In 1985 eight districts were in excess of ± 33 1/3%, three in excess of 20% and two in excess of 15%. Growth pattern over the years has not evened out the existing voter imbalances and, in fact, has excellerated these imbalances. The Board will not allow this pattern to continue even for another three years.

As mentioned previously, the Board is concerned with the fact that Council's proposal uses the centre line of many roads in the Municipality in defining boundary lines for the proposed districts. In other areas the Board has discouraged this practice as it leads to some confusion and occasionally some inequities for neighbours facing each other across the affected roads. Because of the obvious need for change and the time requirements necessary for the 1988 municipal elections the Board is prepared to accept the boundaries as outlined in the present application even though some of these inequities are present.

The Board is also aware that due to the time constraints under which the proposal had to be prepared and because of the number of boundary lines affected by the proposal, it is likely that other inequities will occur and will become evident as the 1988 election process is carried out.

In order to identify and correct these problems the Board strongly recommends that a Boundary Review Committee be established by the Municipality immediately after the 1988 Council election. The Committee would then review any inequities and could recommend that Council make an application to the Board to have the boundaries corrected prior to the 1991 election. This Committee should also monitor the voting population and community of interest within each Polling District in preparation for the next boundary review. Public participation on the Committee and input at hearings of the Committee should also be encouraged.

The Board notes that this periodic review of Polling Districts works best when a Municipality, with the local knowledge, makes an effort to comply with the principals of equality of voters, communities of interest and geographic location and works in co-operation with the Board to achieve these ends. Usually minor changes to boundaries at each review period to correct imbalances tend to avoid the necessity of major disruptive changes which occur when there are long delays between reviews. The Board commends Warden Dunnewold and his Committee for the obvious effort put into the redesignating of the boundaries in the proposal.

The Board confirms the existing boundaries of the Districts of 2, 9, 13, 14 and 16 and approves the new boundaries of Districts 1, 3, 4, 5, 6, 7, 8, 10, 11, 12, 15 and 17 in the manner shown on the map presented to the

Board. The Board confirms the number of Councillors elected therefrom to be 17.

When the Board has received the legal descriptions of the new Polling Districts from the Municipality an Order will be issued.

DATED at HALIFAX, Nova Scotia, this 30th day of March, A. D., 1988.

Michael G Johnson

MICHAEL G. JOHNSON, C.A.
Chairman,

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman,

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

RE: MUNICIPALITY OF THE COUNTY OF QUEENS

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

Application to confirm the number of polling districts and number of councillors at 12 with some minor boundary variations. There was at the same time before the Board an application by the Town of Liverpool to annex a small area of Queens in which there were no voters. At the same time the Village of Milton had an application to define its boundaries in relation to two polling districts of Queens. Many of the areas are out of balance in representation by population.

HELD: The Board approved the application.

The Board becomes concerned when variations from the average exceed 33 1/3% ± because the principal of representation of population demands equal citizens voting weight be given each citizen's vote when determining elected representation. The Board recommended that various districts be studied for rearrangement of boundaries prior to the next review or the next election.

The Board acknowledged district 1 could lose an area under Liverpool annexation (see NSMB-18-86-MB). The Board acknowledged the Village of Milton application to define its boundaries in relationship to two polling divisions (NSMB-4-86-VSA). P.U.B. in its preceeding periodic review had comments concerning district 5 and allowed for greater growth in the area. Growth has not occurred.

The Board said that the Municipality should review all of its boundaries prior to 1991 in order to give more effect to the principal of representation by population.

NOTE: Since this decision, the Liverpool Annexation has been approved. The Village of Milton's boundaries have been defined by a separate application.

NSMB-37-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE COUNTY OF QUEENS** for the confirmation of the Number and approval of certain changes in the Boundaries of the Polling Districts and the confirmation of the Number of Councillors to be elected from each Polling District.

BEFORE: LINDA D. GARBER, Vice-Chairman.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE COUNTY OF QUEENS** (hereinafter referred to as the "Municipality") for the confirmation of the Number and approval of certain changes in the boundaries of the Polling Districts in the Municipality and confirmation of the number of councillors to be elected from each, was heard on February 5, 1988 in Council Chambers, Liverpool, after due public advertisement in the Chronicle Herald and The Liverpool Advance, two newspapers circulating in the Municipality.

Gerald Freeman, Q.C., appeared as counsel for the Municipality, together with Mr. Leon Robertson, Municipal Clerk, and Warden Stanley Smith.

The Municipality at present has twelve polling districts with one councillor elected from each. During 1987, it authorized a study to be done into the fairness and reasonableness of the representation and the boundaries of the polling districts. The study reviewed among other things changes in the population in the various polling districts, anticipated planning and development activities and the number of assessment accounts and values in each district. It should be noted that the study did not consider voter statistics but relied on population (including seasonal residents) and numbers of taxpayers in determining whether or not the boundaries were fair and reasonable. The Municipality felt that there should be some small changes in the legal descriptions of the boundaries, but decided by Resolution of Council dated December 8, 1987, that the number of polling districts and councillors remain at twelve.

The voter statistics from the 1985 municipal elections were submitted by the Municipality in Schedule "F" of its application. The Municipality provided 1987 voter statistics for Districts 3 and 10, but did not update the other districts.

DISTRICT NO.	DISTRICT	VOTERS	VARIATION FROM AVERAGE	PERCENT VARIATION FROM AVERAGE
1	Mersey Point/ Hunts Point	1039	448	76%
2	Port Mouton/ Port Joli	777	186	31%
3 (1987 figures)		570	(21)	(4%)
4		846	255	43%
5		387	(204)	(35%)
6		527	(64)	(11%)
7	Eagle Head/ Port Medway	622	31	5%
8		638	47	8%
9		387	(204)	(35%)
10 (1987 figures)	N.Brookfield/ Westfield	588	(3)	(1%)
11	Caledonia/ N.Queens Nursing Home	425	(166)	(28%)
12	Kempt	292	(299)	(51%)
	TOTAL:	7098		

AVERAGE: 591 (Voters per Councillor)

The Board becomes concerned when variations from the average exceed ± 33 1/3%, because the principle of representation by population demands that each citizen's vote carry approximately the same weight when determining elected representatives. The variations in Districts 1, 4, 5, 9 and 12 all exceed ± 33 1/3% and Districts 2 and 11 are becoming quite high varying by 31% and (28%) respectively.

As pointed out in the application, District 9 is a recreational area where only 387 of the 1647 property owners are eligible to vote. The Warden indicated in his testimony that the taxpayers had increased in this area, but not necessarily the voters. He described it as the one district that was growing faster than the others. This District has a large geographic area, which makes it difficult for one councillor to represent, however, the Municipality should review this district prior to the next election with a view to creating a better balance in the number of electors.

District 1 encompasses an area bordering on the Town of Liverpool and includes Mersey Point, White Point and Hunts Point. The Warden represents this area, and he felt the district was growing due to housing development in Mersey Point and general growth in the White Point Beach area. He testified that there seemed to be a trend that people were "moving rural" and that voters were fairly well dispersed throughout the district. The district has the largest number of voters per councillor, being 76% above the average. The district only borders Districts 2 and 3, and it would be difficult to add voters to District 2, which already is 31% above the average. District 3, using 1987 figures, is 4% below the average, but it covers a fairly broad geographic area. The Board is aware of the application of the Town of Liverpool to annex a portion of District 1 and that this would alter the Town boundary line if approved. The evidence at the hearing indicated that no voters would be affected by that application, and that regardless of the outcome, the boundary line will be the Town line. The Board is of the opinion that before the next mandatory review, the Municipality should explore the possibility of combining portions of Districts 1 and

2 with District 3, or creating a new polling division from parts of Districts 1 and 2 to better equalize the distribution of voters.

Polling District No. 4 is another heavily populated area, bordering on the Town of Liverpool, and on Districts 3, 11, 9, 8 and 5. The application of the Municipality indicated that another application was in progress for a change in the description of the boundaries of the Village of Milton which is in both Districts 3 and 4. Without commenting on that separate application, the Board is at present concerned only with the boundaries between Districts 3 and 4 as they affect voting in municipal elections. The Board has noted the variation in the number of voters between Districts 3 and 4, and Districts 4 and 5. The concentration of population in District 4 is mainly along the Mersey River which is somewhat territorially removed from District 5. The study examined the possibility of combining Districts 5 and 6, but the Board is not aware of any review of a possible division of part of District 4 and combining it with District 5.

District 5 is an area of particular concern, being 35% below the average number of councillors per district. In the last review, the Public Utilities Board noted at page 5 of its decision dated November 16, 1981,

> "As a community next to the Town of Liverpool, it is anticipated that growth will occur in District 5 when the central sewage system is

> installed in the District. It is anticipated the [that] development will also take place west of District No. 6. There is a possibility of a new shopping complex for District 5 which will have an effect on its population... It would appear logical to combine Districts 5 and 6 which combined have 538 ratepayers, which is only slightly above the 524 average for the Municipality. The Councillors for both Districts state that both groups are strongly opposed to the area being combined into one District. Under the circumstances, it does not appear advisable to make any changes with respect to District 5 and 6 until further development takes place in the area. At that time further consideration should be given to changing the boundaries of the Polling Districts in the area."

The situation has not changed materially since 1981. The geographic area of Districts 5 and 6 is not large; parts of the Village of Brooklyn comprise each district; and the population has remained fairly low. The Municipality has requested that the boundaries of the polling districts 5 and 6 correspond to the village boundaries set out in the Municipal Board's decision dated March 14, 1986, and the Board is of the opinion that the boundaries should be consistent. However, the Board is also of the opinion that Districts 5 and 6 should be reviewed before the next municipal election in 1991 to promote a better distribution of the number of voters per councillor.

District 12, the area near Kempt, is 51% under the average number of voters per councillor and has not shown any real growth since 1981. This District is close to Kejimkujik National Park, and thus has summer activity, but the number of voters eligible to vote in 1985 elections totalled only 292. In the last decision of the Public

Utilities Board it was pointed out that if Districts 11 and 12 were combined, it would be difficult for one Councillor to adequately represent the combined Districts. While the Board recognizes that combining Districts 11 and 12 would make a large district in geographic area, a major portion of that area would be comprised by the national park lands, part of the Tobeatic Wildlife Management area, and part of Lake Rossignol. Clearly development is not going to occur in these protected areas, and the populated areas a councillor would represent are not that diverse.

The application of the Municipality also contained a number of minor changes to the legal descriptions of the polling districts, which do not affect any voters. The Board considers these changes to be entirely appropriate and should be approved.

The Board is prepared to confirm the application of the Municipality, however, the Board strongly recommends that the Municipality conduct a review prior to the 1991 municipal elections of all the existing boundaries with the intent of drawing new boundaries that will result in a more equal distribution of the voters within the Municipality.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 9th day of March, A.D., 1988.

Linda D. Garber
LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD

RE: MUNICIPALITY OF THE COUNTY OF RICHMOND

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

CAO of the Municipality made a study comparing the Municipality with all other non-town/city municipalities, and he recommended no change in the status quo. Council approved his recommendation and applied to the Board for confirmation.

HELD: The Board approved the application.

The P.U.B. previously decided that if two of the smallest polling districts were combined, as their population might indicate, the combined district would comprise 43% of R's total area.

District 2 consists of several small communities. District 2 has too many voters in relation to the average. These communities have no apparent natural boundary to split the polling districts. The Board strongly recommended a review of all boundaries prior to the 1991 elections to allow a much more equitable distribution of voters within the polling districts of the municipality.

NOTE: See also Samson v. Municipality of the County of Richmond in this volume.

NSMB-38-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S. 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE COUNTY OF RICHMOND** for the confirmation of the Number and Boundaries of the Polling Districts and the Number of Councillors to be elected from each Polling District.

BEFORE: LINDA D. GARBER, Vice-Chairman.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE COUNTY OF RICHMOND** (hereinafter referred to as the "Municipality"), for the confirmation of the number and boundaries of the Polling Districts in the Municipality and the number of Councillors to be elected from each, was heard January 14, 1988, in Arichat after due public advertisement in The Scotia Sun and Le Courier, newspapers circulating in the Municipality.

Mr. Arthur Pickup appeared as Solicitor for the Municipality together with Mr. Louis Digout, Clerk and Chief Administrative Officer. Council requested Mr. Digout to conduct a study of the reasonableness and fairness of the number and boundaries of the existing Polling Districts in the Municipality and the number of Councillors elected from each. Mr. Digout prepared an excellent report which reviewed capital expenditures, building permits issued, geographic size of the polling districts, voter population in each district and also compared the Municipality's population, acreage and number of councillors with that of the 23 other municipalities in the Province. It was his recommendation that the number and boundaries of the polling districts and the number of councillors elected in each be confirmed. Council adopted his recommendation by Resolution dated October 13, 1987.

The voter statistics for 1979 and 1985 are as follows:

DISTRICT	VOTERS 1979	PERCENT VARIATION	VOTERS 1985	PERCENT VARIATION
1	700	(4.6)	776	3.1
2	1147	56.2	1165	54.9
3	627	(14.57)	631	(16.0)
4	659	(6.4)	637	(15.2)
5	781	6.4	750	(.2)
6	823	12.12	827	9.9
7	777	5.8	803	6
8	1043	42.09	1134	50.7
9	919	25.2	1026	36.4
10	303	(58.7)	263	(65.0)
11	293	(60.08)	263	(65.0)
TOTAL:	8,079	TOTAL:	8,275	
AVERAGE:	734 (Voters Per Councillor)	AVERAGE:	752 (Voters Per Councillor)	

At the time of the last review in 1981 the Public Utilities Board considered the 1979 voter statistics and despite the wide variation in the number of voters represented by each councillor confirmed the number of boundaries of the polling districts. The Public Utilities Board noted that if "Districts

10 and 11, with the smallest number of electors, were combined the new district would comprise 43% of the geographical area of the County and is serviced mainly by dirt roads".

The 1985 voter statistics indicate that the percentage variation from the average number of voters per councillor has been reduced in some districts while in Polling Districts 8, 9, 10 and 11 there has been a significant increase in the percentage variation. In addition District 2 has a 54.9% variation from the norm.

District 2 has the smallest geographic area in the Municipality. There are 4 major communities in the District: Petit De Grat, Little Anse, Sampson's Cove and Alderny Point. Those communities have common characteristics and interests. All the communities are located in close proximity to each other with no apparent natural boundary to split the polling district.

As has been noted above, the Public Utilities Board discussed the possibility of combining Districts 10 and 11 which have a similar community of interest. At the hearing the Board asked whether or not a portion of District 9 could be added to District 10 or 11 and the view was expressed that District 9 has a different community of interest than either Districts 10 or 11.

The Board is prepared to confirm the number and boundaries of the existing polling districts, however, the Board strongly recommends that the Municipality conduct a review prior to the 1991 elections of all the existing boundaries with the intent of drawing new boundaries which will result in a more equal distribution of voters within the Municipality.

An Order confirming the number and boundaries of the Polling Districts and the number of councillors to be elected therefrom will be issued.

DATED at HALIFAX, Nova Scotia, this 12th day of February, 1988.

Linda D. Garber
LINDA D. GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD

SAMSON v. MUNICIPALITY OF THE COUNTY OF RICHMOND

MUNICIPAL BOUNDARIES - AMENDMENT TO BOUNDARIES - RATEPAYERS APPLICATION - NUMBER OF VOTERS IN POLLING DISTRICT - GEOGRAPHIC SIZE. MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 16; 16(2); 17.

S obtained a Petition of 50 ratepayers to support his application to subdivide Polling District 2 into two polling districts and increase the number of councillors by 1. S brought evidence founded on his own knowledge, his study of federal voters lists and the births, deaths and marriage records of the local R.C. Church. The Municipality relied on the Board decision of February 16, 1988 which reviewed the polling districts.

HELD: The Board dismissed the application and confirmed its decision of February 12, 1988.

The Board agrees the number of voters in District 2 is considerably higher than the average number of voters per Councillor for the whole Municipality. This imbalance, however, prevails in Districts 8 and 9 as well. The Board considers that the average number of voters per councillor in the Municipality (1 Councillor per 752 voters) should not be decreased at this time.

The Districts with the smallest amount of voters have the largest areas and are otherwise poorly serviced.

The municipal elections to be held in October, 1988, set practical restrictions on the Board's willingness to act. The Board believes the factors presented by S are not of sufficient weight to cause the Board to interfere with the process of electoral preparation.

In the previous decision the Board strongly recommended that the Municipality totally review all its existing district boundaries prior to the 1991 election. The Board notes the effort put into this application reinforces the Board's previous decision to order a review.

NSMB-1-88-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 16 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of **GEORGE SAMSON et al** for the Division of District Number 2 of the Municipality of the County of Richmond into two Districts and the addition of another Councillor to be elected from the new Polling District.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.
LINDA D. GARBER, Vice-Chairman.
RICHARD L. WELDON, Member.

COUNSEL: GEORGE A. SAMSON, on his own behalf and on behalf of others in District Number 2;

ARTHUR PICKUP, LL.B., on behalf of the Municipality of the County of Richmond.

DECISION

Pursuant to Section 16 of the Municipal Boundaries and Representation Act, a hearing was held in the Court House, Arichat, Richmond County, on Thursday, May 26, 1988, at 10:00

a.m. for the purpose of hearing the application of **GEORGE SAMSON et al** to divide Polling District Number 2 of the Municipality of the County of Richmond ("Municipality") into two polling districts and to add one Councillor. The hearing was duly advertised in the Scotia Sun and Le Courrier, newspapers circulating within the Municipality.

Mr. Samson appeared on behalf of himself and called no other witnesses. Counsel for the Municipality, Mr. Arthur Pickup, called only one witness, Mr. Louis A. Digout, Chief Administrative Officer for the Municipality. Mr. John Goyetche, Warden for the Municipality and Councillor for District 2, testified on his own behalf.

At the request of the Board, Mr. Samson reviewed the process he used to obtain the required 50 signatures for the application and how he attempted to ensure that all signees were indeed ratepayers of the Municipality. He stated that to the best of his knowledge all persons who signed the Petition were ratepayers of the Municipality. In the absence of any evidence to the contrary, the Board accepted his testimony and assumed jurisdiction to hear the application.

Attached to the application received by the Board (Exhibit R-1) were lists of Births, Deaths and Newcomers to District 1; Births, Deaths and Newcomers for District 2; a preliminary list of electors - Elections Canada - Cape Breton Highlands Canso; a list of electors 1984 - Electoral District of Richmond - Polling Divisions 5, 6, 7, 8, 9 and 10; a list of building permits for 1984, 1985, 1986, 1987 and a map of the area (Exhibits R-2 to R-6).

Mr. Samson presented an opening brief to the Board (Exhibit R-8) in which he outlined the need for an additional polling district and councillor for Petit de Gras (District 2) because of population and industrial growth in the area. He expressed some concern that the present councillor for the area was also the Warden and could only vote in case of a tie and therefore the district does not have a voting councillor.

At the urging of the Board, Mr. Samson reviewed some of the detail contained in the application from the ratepayers and indicated how some of the voter statistics included therein were developed. From this testimony and from cross-examination by Mr. Pickup it was evident that the information concerning births and deaths in Districts 1 and 2 was obtained from the Parish Records of the local Roman Catholic Church. The list of newcomers was prepared from personal knowledge of Mr. Samson. All the facts and statistics gathered by Mr. Samson related solely to Polling Districts 1 and 2. Mr. Samson had no direct knowledge as to the growth pattern or similarities of these districts to the other districts of the Municipality.

Included in the Ratepayers application was a suggestion that approximately 85 voters be moved from District 1 representing Arichat into one of the new Districts of Petit de Gras. Mr. Samson admitted that none of these people were approached concerning their feelings towards the recommendation for inclusion in one of the new Districts. He pointed out that this area had been part of District 2 until 1970.

In January, 1988, the Board held a hearing in Arichat pursuant to Section 17 of the Municipal Boundaries and Representation Act, S.N.S. 1982, Chapter 10 as amended for the purpose of reviewing the number and boundaries of polling districts in the Municipality and the number of Councillors to be elected from each. As a part of this review, a study (Exhibit R-7) was prepared by Mr. Louis A. Digout, Chief Administrative Officer for the Municipality.

Mr. Samson and the ratepayers in their application made extensive reference to the various pages of this study. Mr. Pickup in his cross-examination spent considerable time in reviewing these comments. It was very apparent to the Board that Mr. Samson spent a great deal of time and effort in putting together the facts used in the application, especially with the limited resources available to him. It is evident that many of the comments made by Mr. Samson are, by necessity, based on assumptions arrived at from the examination of limited facts and facts which apply solely to Districts 1 and 2 and not the whole Municipality.

Mr. Louis A. Digout, Chief Administrative Officer for the Municipality and author of the previously mentioned boundary study, reviewed many of the comments included in the application which referred to his study. He stated that wherever possible the figures used in the preparation of his study were based on

Statistics Canada figures or other similar independent sources. He stated that councillors always felt that there were more voters than Statistics Canada information would indicate. He felt Mr. Samson's statistics, which showed an increase in numbers of voters, contradicted the Statistics Canada 1986 information which showed a decline in the population for the Municipality. In his opinion, this decline in population has been fairly uniform in the three basic subdivisions (as defined by Statistics Canada) included within the County. In fact, the decline was 3% in the Isle Madame Subdivision. The other two areas of the Municipality are subdivided by the separation of St. Peter's Canal.

Mr. Digout indicated that the 85 voters proposed to be moved from District 1 to District 2, view Arichat as their home, where their community of interest is, where their common employers are and where there is a common cultural background.

Mr. Digout informed the Board that the Warden of the Municipality does have a vote in all matters before Council but in practice often only exercises his vote in case of a tie. In response to questioning, Mr. Digout felt that by nature of the involvement of the Warden in all matters relating to the Municipality, his representation of District 2 would have more influence instead of less as had been suggested by Mr. Samson. The Board agrees with Mr. Digout.

Mr. John Goyetche, the Warden and Councillor for District 2 of the Municipality, testifying on his own behalf, indicated that he would enjoy having two Councillors from Petit de Gras. With the exception of some informal discussions with Mr. Samson, none of the persons who signed the application had approached him for expansion of their Council representation and no formal application had ever been received for such expansion prior to the current one under review. He confirmed that the statistics seemed to indicate a population decrease and that he could see no reason to change Council's previous recommendation to the Board that there be no change in the current polling district boundaries and number of councillors for the Municipality.

Section 16(2) of the Municipal Boundaries and Representation Act lays out various facts to be considered by the Board and states as follows:

> "In settling and determining the number and boundaries of wards and polling districts and the number of aldermen or councillors for each ward or polling district, the Board shall give consideration, among other things, to population density, community of interest and geographic size of wards and polling districts."

In addition to reviewing the testimony and exhibits related to the hearing the Board also reviewed its decision of February 12, 1988, concerning the application of the Municipality of the County of Richmond for the confirmation of the number and boundaries of the polling districts and the number of councillors to be elected from each polling district (NSMB-38-87-MB-unreported).

The voter statistics for 1979 and 1985 accepted and used by the Board in that decision are as follows:

DISTRICT	VOTERS 1979	PERCENT VARIATION	VOTERS 1985	PERCENT VARIATION
1	700	(4.6)	776	3.1
2	1147	56.2	1165	54.9
3	627	(14.57)	631	(16.0)
4	659	(6.4)	637	(15.2)
5	781	6.4	750	(.2)
6	823	12.12	827	9.9
7	777	5.8	803	6
8	1043	42.09	1134	50.7
9	919	25.2	1026	36.4
10	303	(58.7)	263	(65.0)
11	293	(60.08)	263	(65.0)

TOTAL: 8,079 TOTAL: 8,275

AVERAGE: 734 AVERAGE: 752
(Voters Per Councillor) (Voters Per Councillor)

The Board recognizes Mr. Samson's position that the current number of voters in District 2 would be different than those shown above. The Board believes that change also would have occurred throughout the whole Municipality and that the relative positioning of the 11 Districts would not be materially changed if current figures were available for all.

While agreeing with Mr. Samson that the number of voters in District 2 is considerably higher than the average number of voters per councillor for the whole Municipality, the Board wishes to point out that this situation also applies to Districts Number 8 and 9 and that the addition of another Councillor for District 2 would only serve to compound the problem in the other two districts. The average number of voters per Councillor for the Municipality (752 for 1985) is already low and an additional councillor would lower it even further and the Board does not believe this would be appropriate at this time.

The area of Petit de Gras encompassed in District 2 is linked closely by a common community of interest with similar backgrounds, schools, churches, etc. It appears that, from a community of interest point of view, there would be no real benefit gained by the community by splitting it into two districts. It appears from the evidence that the approximately 85 voters proposed to be removed from District 1 and included in one of the new districts would not share the same community of interest as those of the Petit de Gras area.

District 2, while having a large population, has a very small geographic area of approximately 4 square miles. On the other hand, Districts 10 and 11, which have the smallest number of voters represent approximately 42% of the geographic area of the Municipality and are poorly serviced. Although this may not be of primary concern to residents of Petit de Gras, it is to the Municipality as a whole and thus to the Board.

While conscious of the effort and work put in by Mr. Samson in the preparation of the current application the Board feels that it is unfortunate that Mr. Samson did not make the presentation at the January hearings of the Board when the review of the whole of the Municipality's polling districts was carried out.

The Board is also conscious of the fact that Municipal elections are to take place in October of this year and that many of the processes required by Legislation to prepare for this election are well underway and thus certain practical restrictions are placed on the Board's ability to act. The Board does not believe that the facts presented during this hearing carry sufficient weight to cause an interference with this process at this time.

The Board in its decision of February 12, 1988, confirmed the application of the Municipality for the number of Polling Districts and Councillors and reviewed the voting statistics, community of interest and geographic size of the various polling districts located within the Municipality. In its conclusion, the Board made the following comment:

> "The Board is prepared to confirm the number and Boundaries of the existing polling districts, however, the Board strongly recommends that the Municipality conduct a review prior to the 1991 elections of all the existing boundaries with the intent of drawing new boundaries which will result in a more equal distribution of voters within the municipality."

The Board sees nothing new in the current application which would cause it to change its previous decision but does point out to the Municipality that this current application strongly reinforces the Board's opinion that a review of all the existing boundaries with the intent of drawing new boundaries should be carried out prior to the 1991 elections.

Accordingly, the Board dismisses the application of George Samson et al to divide District Number 2.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 20th day of June, A.D., 1988.

Michael G Johnson

MICHAEL G. JOHNSON, C.A.
Chairman.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

RE: MUNICIPALITY OF THE DISTRICT OF SHELBURNE

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

After study by the Executive Committee, Municipality applied to confirm 7 Councillors but to redistribute the boundaries. The P.U.B. in 1982 had expressed concern about voter imbalance.

HELD: The Board approved the application.

Some of the changes redistributed more equitably the voter population. Smaller changes assisted the community of interest and clarified boundary lines. Other changes were of a typographical nature.

The Board is satisfied the proposal adequately addressed the factors of population density, community of interest and geographic area.

NSMB-39-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE DISTRICT OF SHELBURNE** for the confirmation of the Number and approval of certain changes in the Boundaries of the Polling districts and the confirmation of the Number of Councillors to be elected from each Polling District.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE DISTRICT OF SHELBURNE** (hereinafter referred to as the "Municipality") for the confirmation of the number and approval of certain changes in the boundaries of the Polling Districts in the Municipality and confirmation of the number of councillors to be elected from each, was heard on Monday, December 14, 1987, in Council Chambers, Shelburne, after due public advertisement in the Coast Guard and The Guardian, two newspapers circulating in the Municipality.

Mr. Gary Foster appeared as counsel for the Municipality, together with the Municipal Clerk Treasurer, Mr. Alan Merritt and Warden Hobart Blades, and Councillors Jack McKenny, Emma Harris, Avis Dexter and Elmer Nickerson.

The Municipality, through the Executive Committee of Council and Municipal Clerk-Treasurer, carried out a study of the existing polling districts and representation in June, 1987.

The study noted that while there had been growth in the Municipality overall, Districts 4 and 6 had more voters than the other districts. The study suggested that the number of Councillors was sufficient at seven, but that the boundaries of the polling districts should be changed to better equalize voter population.

The voter statistics from the 1985 municipal elections in Shelburne were as follows:

DISTRICT	VOTERS	VARIATION FROM AVERAGE	PERCENT VARIATION
1.Port Clyde	402	(138)	(26%)
2.Gunning Cove	492	(48)	(9%)
3.Lwr. Sandy Point/ Jordan Ferry	403	(137)	(25%)
4.Ohio, Sandy Point, Roseway Manor	727	187	35%
5.Jordan Falls	518	(22)	(4%)
6.E.G. Harbour/W.G. Harbour	754	214	40%
7.Sable River/Little Harbour	482	(58)	(11%)
TOTAL:	3,778		

AVERAGE: 540 (Voters per Councillor)

As previously noted, the largest variations from the average occur in Districts 4 and 6. The Municipality proposed in its application that the boundary between Districts 6 and 7 be changed to include the Pleasant Point and Osborne Harbour areas in District 7. This change would see approximately 94 voters added to District 7.

The second proposed change would amend the boundary between Districts 3 and 4 to include the Sandy Point area in District 3. This change would relocate approximately 235 voters into District 3.

Smaller changes are proposed in the Municipality's application primarily on the basis of community of interest and for clarification of boundary lines:

1. A change in the Northern boundary of District 2, to include 26 voters on the south end of the Welshtown Road in District 4;

2. A change in the boundary between Districts 3 and 5 to allow 6 voters on the west side of Enslows Point Road to be part of District 5; and

3. A change in the boundary between District 5 and District 6 to include all of Benham's Road in District 6. This change would affect future voters if development occurs.

Other changes were simply of a typographical nature to more accurately describe the polling district boundaries and to correct lake and landmark names.

Using the 1985 voter statistics and applying the voter changes as outlined in the Municipality's application the voter statistics would be as follows:

DISTRICT	VOTERS	VARIATION FROM AVERAGE	PERCENT VARIATION
1.Port Clyde	402	(138)	(26%)
2.Gunning Cove	466	(74)	(14%)
3.Lwr.Sandy Point,			

Jordan Ferry	632	92	17%
4.Ohio, Roseway Manor	518	(22)	(4%)
5.Jordan Falls	524	(16)	(3%)
6.E.G. Harbour, W.G. Harbour	660	120	22%
7.Sable River, Little Harbour	576	36	7%
TOTAL:	3,778		

AVERAGE: 540 (Voters per Councillor)

The Municipality submitted net estimated projections of 1987 electors in Schedule "H" of its application, and while there will be some increases, the percentage variations will be consistent with those outlined above. The major variations in Districts 4 and 6 will be eliminated.

The Board has reviewed the application of the Municipality and the evidence presented at the hearing. There was some opposition to the suggested boundary line drawn between Districts 3 and 4 by the councillors for these districts, who presented some alternatives. After reviewing their presentations, the Board is satisfied that Council has presented a proposal that adequately addresses the factors of population density, community of interest and geographic area. Certainly by removing 235 electors from District 4 and adding them to District 3, the Municipality has alleviated some of the concerns the Public Utilities Board outlined in its decision in the last municipal polling district review, dated February 5, 1982.

The Board is satisfied that the boundary line proposed between Districts 6 and 7 accomplishes an equalization of voters in the area without disturbing communities of interest.

The Board is also of the opinion that the smaller or more minor changes proposed by the Municipality are appropriately set forth for this type of review and should be approved.

The Board is prepared to confirm the application of the Municipality as presented, and an Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 2nd day of March, A.D., 1988.

MICHAEL G. JOHNSON, C.A.
Chairman.

NOVA SCOTIA MUNICIPAL BOARD

RE: MUNICIPALITY OF THE DISTRICT OF ST. MARY'S

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

Municipality struck a special committee to study its municipal boundaries and representation, adopted the recommendation of the Committee and applied to the Board to confirm the same. District 5 differed 38.4% under the norm for voters per Councillor.

HELD: The Board approved the application.

The voter imbalance in District 5 could not be reasonably corrected because of the large geographic area and the location of the communities in that area in that it would destroy the community of interest in the area.

NSMB-40-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S. 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE DISTRICT OF ST. MARY'S** for confirmation of the Number and Boundaries of the Polling Districts and the Number of Councillors to be elected from each Polling District.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman,
LINDA D. GARBER, Vice-Chairman,
RICHARD L. WELDON, Member.

DECISION

The Application of the **MUNICIPALITY OF THE DISTRICT OF ST. MARY'S** (hereinafter referred to as the "Municipality"), pursuant to Section 17 of the Municipal Boundaries and Representation Act, for confirmation of the number and boundaries of the Polling Districts in the Municipality and the number of Councillors to be elected from each, was heard at the Council Chambers, Municipal Administration Building, Sherbrooke, Nova Scotia, on December 7, 1987, after due public advertisement in the Chronicle Herald on November 14th, 20th and 27th, 1987.

Mr. Robin Archibald appeared as counsel for the Municipality, together with Mrs. Helen MacDonald, Municipal Clerk and Treasurer, and Warden Edison Sutherland, Councillor for District No. 3, East River.

A special committee of three councillors was appointed to study the boundaries and representation of Council, and recommended on June 8, 1987, that the districts and councillors should remain as they now existed.

Council for the Municipality passed a Resolution at its June 8th meeting endorsing the recommendation of the Committee.

The following are the voter statistics for the Municipality for the 1985 municipal elections. Population statistics for the Municipality were not presented in evidence.

DISTRICT NO.	DISTRICT	NO. OF VOTERS	(VOTER) VARIATION FROM AVERAGE	(VOTER) PERCENT VARIATION
1	Sherbrooke	372	62	20 %
2	Ecum Secum	304	(6)	(1.9%)
3	East River	323	13	4.1%
4	Port Hilford	326	16	5.1%
5	West River	191	(119)	(38.4%)
6	Goshen	353	43	13.8%
7	Liscomb	261	(49)	(15.8%)
8	Port Bickerton	351	41	13.2%
	TOTAL:	2481		

AVERAGE: 310 (Voters per Councillor)

The Board expressed concern about the small number of voters in District 5, West River, which is 38.4% below the average. Mr. Archibald indicated that this was the largest district in terms of area, running from the West River across to Trafalgar and encompassing a large number of woodlot areas.

Mr. Archibald indicated that it would be difficult to reduce the number of districts which have historical significance and which follow the present communities of interest within the Municipality. No residents had ever expressed concern to the Councillors or the Warden about their representation, nor did residents attend at the Municipal Board's hearing. The Board inquired as to whether there had been any public meetings held in the Municipality on the issue of representation prior to the application being made, and it was indicated that this had not been done.

At the last boundary review in 1981, the Public Utilities Board in its decision dated January 15, 1982, indicated that "should the disparities, particularly as shown in Districts 1, 3, 5 and 8, become any more pronounced...the Council is urged to give serious attention to show the disparities can be corrected". In 1985, the disparities decreased in all of these districts except for District 5. The Board is of the opinion that it would be very difficult to subdivide or combine District 5 with any adjoining district because of the geographic distances involved.

The Board has considered the voter statistics, the community of interest and the geographic size of the polling districts, and concludes that the Application should be approved as presented. The Board will order that the number and boundaries of the Polling Districts in the Municipality and the number of Councillors to be elected from each be confirmed.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 15th day of February, A.D., 1988.

MICHAEL G. JOHNSON, C.A.,
Chairman.

LINDA D. GARBER,
Vice-Chairman,

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD

RE: MUNICIPALITY OF THE COUNTY OF VICTORIA

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, S. 17.

A consultant recommended to the Municipality that they reduce the number of Councillors from 12 to 9. Council had considered increasing the number of Councillors to 13. The application, with slight changes in certain boundaries, was to maintain the status quo.

HELD: The Board made amendments to the proposal and then approved the amended redistribution.

The Board has concerns when variations from the norm exceed 33 1/3%±. Representation by population demands that each citizen's vote carry approximately the same weight when determining elected representatives.

The Board is prepared to allow variations on the basis of geographic area and community of interest.

District 2 is large in geographic area and to add to its low population either districts 1 or 3 would only transfer the voter imbalance to those districts. 89%+ is the variation for district 5 and is too extreme and cannot be justified on the grounds of geographic area or community of interest. The Board gave the Municipality, after the hearing, an opportunity to supply more information to correct the imbalance. It did not.

The Board therefore felt that it had enough information to split the district on the boundaries of the Village of Baddeck and did so.

NSMB-41-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S., 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE COUNTY OF VICTORIA** for the confirmation of the number and approval of certain changes in the Boundaries of the Polling Districts and for confirmation of the Number of Councillors to be elected from each Polling District.

BEFORE: MICHAEL JOHNSON, C.A., Chairman.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE COUNTY OF VICTORIA** (hereinafter referred to as the "Municipality") for the confirmation of the number and approval of certain changes in the boundaries of the Polling Districts in the Municipality and for confirmation of the number of Councillors to be elected from each was heard in Baddeck on March 1, 1988 after due public notice in the Scotia Sun and the Cape Breton Post, two newspapers circulating in the Municipality.

Mrs. Mabel MacEachern, Municipal Clerk-Treasurer, Mr. Wayne Hutchinson, Municipal Solicitor, and Warden

Chalmers Hamilton attended at the hearing.

During 1987, the Municipality commissioned a study to be done of the existing boundaries and polling districts by Mr. Ed Grimm of V.C.M. Consultants Ltd. The V.C.M. study recommended that the number of councillors be reduced from twelve to nine, which would result in savings to the Municipality of approximately $15,000. The Municipality also considered increasing the number of councillors and polling districts to thirteen. The Municipality decided by Resolution dated November 9, 1987, to maintain the status quo, except for a slight change between Districts 6 and 8.

The 1985 municipal voter statistics for Victoria were not available to the Board. In its petition, the Municipality tendered the following voter statistics for 1984:

DISTRICT	1984 VOTERS	VARIATION FROM AVERAGE	PERCENT VARIATION
1	443	(80)	(15%)
2	319	(204)	(39%)
3	450	(73)	(14%)
4	351	(172)	(33%)
5	986	463	89%
6	414	109	(21%)
7	674	151	29%
8	475	(48)	(9%)
9	610	87	17%
10	649	126	24%
11	561	38	7%
12	350	(173)	(33%)

TOTAL: 6,282

AVERAGE: 523

The Board becomes concerned when variations exceed a ± 33 1/3% variation from the average number of voters per councillor. The principle of representation by population demands that each citizen's vote carry approximately the same weight when determining elected representatives. Districts 2 and 5 exceed the average by - 39% and + 89% respectively, meaning that a vote in District 2 carries three times as much weight as a vote in District 5. It should also be noted that Districts 4 and 12 are very close to exceeding the ± 33 1/3% variation from the average. The Board is prepared to allow variations on the basis of geographic area or community of interest, and accepts this with respect to Districts 2, 4 and 12.

District 2 is a large district in geographic area, and includes land on both sides of St. Patrick's Channel on the Great Bras D'Or Lake. The low population in the district could only be augmented with additions from Districts 1 or 3, which would only transfer the voter imbalance to these districts, which are already low in population. The Board is prepared to allow District 2 to remain as proposed in the Municipality's application. Similar reasons would apply to Districts 4 and 12.

However, the + 89% variation from the average in District 5, is too extreme, and cannot be justified on those grounds. At the hearing, the Municipality was asked to review the situation in District 5, and it was suggested that perhaps the boundaries of District 5 should be moved to encompass the Village of Baddeck alone, and that the remainder of District 5 could be added to District 6 which is - 21% below the average or District 4 which is - 33% below the average. The Warden agreed at the hearing to bring the suggestion to the Finance Committee, (which is composed of the Executive Committee of the Municipality) and indicated at the hearing that adding a portion of District 5 to District 6 might be a workable solution.

The Board was advised on March 14, 1988 that the Committee had considered this option and decided to maintain the status quo, and to recommend no further changes to Council. The Board has not received any alternative proposals to alleviate the disparities noted above, nor has it received any reasons for maintaining the status quo either from the hearing or from the Finance Committee. The Board is not prepared to maintain the status quo, as it relates to District 5, and has decided to confine District 5 to the Village of Baddeck. The planning boundaries for the village have been established since 1984, and are no doubt well-known to the general populace. With this change, District 6 will now encompass that portion of District 5 not included in the Village of Baddeck.

The Board was asked to approve a change in the boundary between Districts 6 and 8. The Municipality indicated that all the area south of St. Ann's Bay should be included in District 8. This change would add Jersey Cove, which is now in District 6, to District 8. The

Municipality felt that the community of interest in the area on one side of the body of water should be encompassed in one District, and noted that at one time it was in District 8. The Board is prepared to approve this change.

The Board has reviewed the application of the municipality, the former decision of the Public Utilities Board and the submissions of the Municipality. The Board will order that the change between District 6 and District 8 be approved, and that the boundary lines for District 5, shall be the boundary lines for the Village of Baddeck. The boundary of District 6 will now extend to the new boundary of District 5.

An Order will issue accordingly.

Dated at Halifax this 23rd day of March A.D. , 1988.

MICHAEL G. JOHNSON, C.A.,
CHAIRMAN.

NOVA SCOTIA MUNICIPAL BOARD

RE: MUNICIPALITY OF THE DISTRICT OF YARMOUTH

MUNICIPAL BOUNDARIES - PERIODIC REVIEW OF POLLING DISTRICTS-MUNICIPAL BOUNDARIES AND REPRESENTATION ACT, SS. 17.

The District Planner studied the representation situation and recommended certain changes in polling district boundaries. He recommended that certain streets be renamed to meet Department of Transport listings and also that certain streets that had been cut off by the construction of 100 series highways be removed to one Polling Division to another since they were now separated. The Municipality agreed and applied to the Board.

HELD: The Board approved the application.

All the polling districts are within the maximum 33 1/3% variation from the norm that the Board is applying in the current revision of municipal polling districts.

The Board recommended the Municipality consider renumbering the polling districts at the time of the next application.

NSMB-42-87-MB

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: Section 17 of the Municipal Boundaries and Representation Act, S.N.S. 1982, C. 10, as amended;

- and -

IN THE MATTER OF: The Application of the **MUNICIPALITY OF THE DISTRICT OF YARMOUTH** for the confirmation of the Number and Boundaries of the Polling Districts and the Number of Councillors to be elected from each Polling District.

BEFORE: LINDA D. GARBER, Vice-Chairman.

DECISION

The Application, pursuant to Section 17 of the Municipal Boundaries and Representation Act, of the **MUNICIPALITY OF THE DISTRICT OF YARMOUTH** (hereinafter referred to as the "Municipality") for the confirmation of the Number and approval of certain changes to the Boundaries of the Polling Districts in the Municipality and confirmation of the number of Councillors to be elected from each, was heard in Yarmouth on January 11, 1988, after due public advertisement in the Vanguard and the Chronicle-Herald.

Mr. Irving Pink, Q.C., appeared as counsel for the Municipality, together with William Scott, Municipal Clerk/Treasurer, Gary Saunders, Planner with Yarmouth-Argyle District Planning Commission, Charles McConnell, Councillor for District No. 1 and Warden Daniel Stanton.

The Municipal Council caused a study to be made of the number and boundaries of the Polling Districts and the number of councillors to be elected from each. As part of the study the District Planner prepared an estimate of the number of voters in each of the polling districts. As well he conducted a survey of Polling District No. 1 to determine if it could be divided into 2 polling districts.

One of the results of the study was a recommendation to Council that there be a minor boundary change between Districts No. 3 and 5 to permit some 30 voters to be included in District No. 5. The construction of Highway 101 had turned Layton Street (which is at present in District No. 3) into a dead-end road. By moving the boundary to Highway 101 those persons living on Layton Street will have easier access to a polling station in District No. 5 than to the one in District No. 3.

The study further recommended that the description of certain boundaries be amended to change the names of streets to those currently used by the Department of Transportation. There were no public hearings held. Council adopted the recommendations.

The following are the voter statistics for the Municipality from the 1985 municipal elections and the estimated statistics for 1987:

DISTRICT NO.	NO. OF VOTERS 1985	ESTIMATED VOTERS 1987	(VOTER) VARIATION FROM AVERAGE	(VOTER) PERCENT VARIATION
1	1,177	1,267	269	26%
3	1,187	1,178	180	18%

4	809	856	(142)	(14.0%)
5	967	1,014	16	1.6%
6	951	1,023	25	2.5%
12	702	714	(284)	(28.4%)
13	902	935	(63)	(6.3%)
TOTAL:	6,695	6,987		
AVERAGE:	956	998 (Voters per Councillor)		

All of the districts are within the maximum variation of 33 1/3% from the average number of voters per councillor which the Board has been applying in the current review of municipal polling districts. District No. 1 is the largest polling district both in terms of number of voters and geographic size. Ninety percent of District No. 1 is vacant land and most of the population lives along the main roads in ribbon development with little infilling. There are a number of cottages in the District as well. The evidence at the hearing was that it was not possible to divide the District given the ribbon development and that there have not been any complaints.

The Board notes that the variation in Districts No. 1 and 12 is not as great as it was in 1981 when the Public Utilities Board confirmed the number and boundaries of the Polling Districts and the number of Councillors to be elected from each.

Having reviewed the application and the testimony at the hearing the Board is of the opinion that the application to amend the boundary between Polling Districts No. 3 and 5 and to clarify the street names in the descriptions of the boundaries of the other polling districts should be approved and that the number of polling districts and the number of

Councillors to be elected from each remain the same. The Board recommends that the Municipality consider renumbering the polling districts at the time of the next application.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 12th day of February, A.D., 1988.

Linda D. Garber

LINDA D. GARBER,
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD

RE: VILLAGE OF MILTON

VILLAGE SERVICES ACT DESCRIBING VILLAGE BOUNDARIES.

Village of Milton applied to have its boundaries more fully described. The Village sought to have the boundaries follow the boundaries of Polling Districts 3 and 4 in the Municipality of the County of Queens. No one opposed the application.

HELD: The Board granted the application and set the boundaries.

The existing boundaries would be better described using the descriptions proposed in the application. The Board noted that if the boundaries of Polling Districts 3 and 4 changed in the future M's boundaries would not automatically follow any such change.

NSMB-4-86-VSA

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Village Service Act, R.S.N.S., 1967, C. 329, as amended;

- and -

IN THE MATTER OF: The Application by the **VILLAGE COMMISSIONERS OF THE VILLAGE OF MILTON** to better describe the existing boundaries of the Village of Milton in the County of Queens and Province of Nova Scotia.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: ALLEN C. FOWNES, LL.B., on behalf of the Commissioners of the Village of Milton.

DECISION

A hearing was held by the Board in the Council Chambers of the Town of Liverpool in the Liverpool Town Hall, Liverpool, Nova Scotia, on April 27, 1988, for the purpose of hearing an application to more fully describe the existing boundaries of the Village of Milton in the County of Queens in the Province of Nova Scotia.

The Notice of Hearing had been duly advertised in the Liverpool Advance to the satisfaction of the Board and the Notices of Hearing had been distributed to all the required people including the Town of Liverpool and the Municipality of the County of Queens.

Counsel for the Appellant informed the Board that he had been in contact with Counsel for the Municipality of the County of Queens (Municipality) and Counsel for the Town of Liverpool (Town) and both had indicated that they would not be attending the hearing as the application to the Board had received approval from each of their councils. He then submitted certified copies of the resolutions of both the Municipality and the Town giving approval to the proposed boundary description (Exhibits M-1 and M-2). He noted that there was a very minor change recommended by the Municipality in their resolution of December 8, 1987. As this very minor change did not, in any way, affect the boundary of the Village and the Town of Liverpool, this change was not submitted to Town Council for its approval. Town Council had given approval on August 29, 1987.

Mr. Fownes called two witnesses to testify on behalf of the Village. Mr. Frederick Wendt, the Director of Planning for the Municipality and Reverend Frederick Gordon the Chairman of the Village Commissioners of the Village of Milton.

Mr. Wendt reviewed the application by the Village Commissioners (Exhibit M-3) dated April 6, 1987, stating that the map and boundary descriptions included as exhibits to the application contained an error. A revised map and description including the change approved by the Municipality was tendered to the Board (Exhibits M-4 and M-5). Mr. Wendt proceeded to compare the two descriptions and noted where the error had occurred. He then outlined in considerable detail the proposed boundary descriptions on the map provided. During this review Mr. Wendt noted that traditionally the boundaries of the Village of Milton had been considered to be the same as the boundaries of Polling Districts 3 and 4 as defined by the Municipality. Area rates for the Village had been charged based on these boundaries. He also pointed out that the description presented to the Board for approval followed the most recent descriptions of these two districts, as approved by the Board in the recent application of the Municipality for approval of polling districts for 1988.

Mr. Wendt also spent some time reviewing the original description of the Village and attempted to relate it to the map provided; pointing out the various ambiguities and vague descriptions which were evident and subject to some interpretation. He also pointed out that where these problems of interpretation existed between the old description and the proposed new description, there were virtually no people who would be affected and therefore the new more precise description could and should be adopted.

Reverend Gordon, Chairman of the Village Commissioners, confirmed the description of the proposed boundaries of the Village of Milton described by Mr. Wendt and stated that this description had been adopted as a by-law by the Village Commissioners on February 2, 1988.

On completion of the testimony, the Board gave verbal approval to the application confirming that the existing boundaries of the Village of Milton would be better described using the description as presented during the hearing and which encompassed Districts 3 and 4 of the Municipality.

The Board notes that this boundary description is intended to follow the descriptions of Polling Districts 3 and 4 as approved in the Board's decision regarding the Municipality of the County of Queens, March 9, 1988, NSMB-38-87-MB (unreported) which reviewed the boundaries of the Polling Districts of the Municipality as required under Section 17 of the Municipal Boundaries and Representation Act, S.N.S. 1982, Chapter 10 as amended.

For clarification the Board notes that its reference to Polling Districts 3 and 4 of the Municipality relate only to the 1988 description and should these descriptions change in the future, the boundaries of the Village of Milton would not automatically follow.

The Board hereby confirms its verbal decision and sets the descriptions of the boundaries of the Village of Milton as outlined in Schedule "A" attached hereto.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 19th day of May, A.D., 1988.

MICHAEL G. JOHNSON, C.A.
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

SCHEDULE "A"

DESCRIPTION OF THE VILLAGE OF MILTON, IN THE COUNTY OF QUEENS AND PROVINCE OF NOVA SCOTIA

ALL that certain portion of land to be used as Municipal Electoral Districts #3 & #4 in the County of Queens and in the Province of Nova Scotia and more particularly bounded and described as follows:

BEGINNING at a point marking the intersection of the centre line of the Mersey River with the northern boundary of the Town of Liverpool being the most southwestern corner of District #4;

THENCE Westerly along the northern boundary of the Town of Liverpool to a point marking the most western corner of the said Town;

THENCE Southerly along the western boundary of the Town of Liverpool 2460 feet more or less to a point marking the northern boundary of District #1;

THENCE Westerly along the northern boundary of District #1 to a point marking the most southerly point of the Town Lake;

THENCE Westerly along the northern boundary of District #'s 1 & 2 to a point near the intersection of the east and west branches of the Broad River;

THENCE Westerly along the northern boundary of District #2 to a point marking the intersection of the centreline of the Tidney River with the most eastern boundary of Shelburne County;

THENCE Northerly, along the eastern boundary of the Shelburne County line 3.5 miles more or less to a point marking the southern boundary of District #11;

THENCE Easterly, along the southern boundary of District #11 in a straight line passing through Tidney Lake on a bearing to strike the point where the brook running from Ten Mile lake to Little Ten Mile Lake leaves Ten Mile Lake;

THENCE Northeasterly, following the various courses of the northwestern shoreline of said Ten Mile Lake to a point where a small brook crossing Provincial Highway #8 enters Ten Mile Lake;

THENCE Northeasterly following the various courses of the said small brook to a point where the said brook intersects the Western sideline of Provincial Highway #8, being a point on the western boundary of Municipal Polling District #9;

THENCE southerly in a straight line along District #9 to a point marking the point where West Brook enters Herring Cove Lake;

THENCE southerly along the various courses of Herring Cove Lake and Herring Cove Brook marking the northern boundary of District #8 to a point 1.3 miles more or less below the dam at Herring Cove Lake;

THENCE southwesterly in a straight line along the northern boundary of District #5 to a point on the eastern boundary of the Town of Liverpool said point lying southerly 820 feet more or less from the most northern corner of the said Town boundary;

THENCE northerly along the eastern boundary of the Town of Liverpool 820 feet more or less to the most northeastern corner of the said Town boundary;

THENCE westerly along the northern boundary of the Town of Liverpool to the place of beginning.